Worlds Colliding: Competition Policy and Bankruptcy Fire Sales

Max Huffman
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ABSTRACT

Modern business bankruptcies commonly involve mergers and acquisitions pursued as “fire sales.” The bankruptcy forum and the unique incentives bankruptcy creates allow those acquisitions to take place with reduced constituent involvement and regulatory oversight. Those fire sale transactions may present antitrust concerns where they lead to undue concentration in the relevant marketplace. This paper studies the poorly explored tension between bankruptcy law, which favors mergers and acquisitions as value-maximizing propositions and creates opportunity for fire sales, and antitrust law, which disfavors combinations leading to undue concentrations of economic power. The substantial tension manifests both as a matter of substantive law and as a matter of procedures used to implement that law. This paper reveals conflicts between bankruptcy and antitrust and argues that the optimal resolution of those conflicts is to correct for the current subordination of antitrust goals to bankruptcy policies. The paper then offers suggestions for reform.

INTRODUCTION

Recent work has studied the effects of mergers and acquisitions conducted in bankruptcy on bankruptcy law and policy. Existing scholarship limits its ambition to the bankruptcy goals of maximizing estate value and protecting the rights of stakeholders. That scholarship reflects a debate pitting theoretical arguments1 against empirical studies2 on the question whether bankruptcy mergers and acquisitions, in particular those conducted as fire sales outside of the plan-confirmation process, adequately protect the rights of all the bankruptcy estate’s constituents.3 None of the participants in this debate have taken

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the additional step of analyzing the role of bankruptcy in the broader economic regulatory framework for depressed industries.4

This article is the first to study the procedural and substantive conflicts between bankruptcy and antitrust in the context of bankruptcy fire sales. Those conflicts arise because bankruptcy and antitrust have opposing goals.5 Neither scholars nor courts have resolved the conflict between bankruptcy and antitrust despite the increasing frequency of potentially anticompetitive mergers and acquisitions6 in bankruptcy. The Butner principle7 speaks to uniformity of results in- and out-of-bankruptcy for constituents of the bankruptcy estate but no analogous doctrine addresses the need for uniform treatment of non-bankruptcy policies that arise in the context of a business bankruptcy proceeding. I address that gap for non-constituents with antitrust concerns flowing from a reorganization.

Antitrust merger review and bankruptcy represent two different approaches to the same goal of optimizing the structure of an industry. Antitrust allows business combinations in which efficiencies from scale or synergy outweigh losses due to concentration, including through more complex remedies than the merely binary stop (injunction) or go (no injunction). Bankruptcy reorganization prevents losses in an industry by avoiding the idling of assets that have going-concern premium. Antitrust law’s failing-firm defense, allowing mergers that might otherwise be blocked in order to prevent the wasting of assets, is a sort of “bankruptcy-lite.” The Bankruptcy Code


5 James M. Spears, Federal Merger Enforcement in Bankruptcy, Spring-Antitrust 19, 19 (1992) (“each regime is designed to accomplish very different objectives. Premerger review under Section 7A is designed to provide the Commission and the Department of Justice with an opportunity to identify, analyze and, where necessary, take steps to halt anticompetitive transactions prior to consummation. Proceedings under the Bankruptcy Code, whether arising as part of a general plan of liquidation under Chapter 7 or as part of a Chapter 11 reorganization, are designed to benefit creditors or the reorganizing corporation by maximizing the return on any assets sold. The potential for friction between these two regimes arises because prospective purchasers are willing to pay a premium for assets that confer market power.”).

6 Bankruptcy and antitrust as a matter of tradition or statute employ different terms – “asset sales,” “mergers,” “acquisitions,” “sales of property of the estate,” “combinations,” and others. I combine all such terms under the phrases “mergers and acquisitions” and – as a subset of that concept, “bankruptcy fire sales” – throughout this paper.

7 Butner v. United States, 440 U.S. 48, 55 (1979) (“Property interests are created and defined by state law . . . . There is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding”); see generally G. Marcus Cole & Todd J. Zywicki, Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy, 2010 Utah L. Rev. 511, 512-14, 521 (discussing Butner).
excepts from the automatic stay actions “to enforce such governmental unit’s . . . police and regulatory power”. Bankruptcy courts are constrained by laws and regulations that apply outside of bankruptcy, including anti-merger laws, and are charged with interpreting and applying those laws.

There are three essential distinctions between bankruptcy and antitrust in the context of mergers and acquisitions. First, bankruptcy is backward-looking, dealing with upstream investor constituents, who may be owners or creditors of the firm. Antitrust is forward-looking. It deals with downstream consumer constituents who are not present at the time challenged conduct occurs and lack a voice in that conduct. When a merger or acquisition takes place in bankruptcy, those constituencies conflict. Bankruptcy protects investors by maximizing the payout from the assets while antitrust, if applied, protects consumers by preserving marketplace competition.

Second, bankruptcy goals are served by a merger or acquisition that benefits the investors in the bankrupt firm by maximizing the estate value. Maximal value is likely to occur where the merger or acquisition creates market power for the acquiring firm that can be leveraged to the detriment of consumers. Antitrust law disfavors mergers or acquisitions producing market power unless there are countervailing benefits—efficiencies—that outweigh the harms. The benefits bankruptcy seeks, in terms of maximum value to the investors in the firm, are likely to be realized in a circumstance in which the antitrust harms from increased market power are greatest.

Third, as the term “fire sales” suggests, mergers and acquisitions in bankruptcy proceed at a much accelerated pace. Observers frequently speak of the “need for speed” or of concerns for a “melting ice cube.” Where antitrust review is protected in bankruptcy, the enforcement agencies are given a shorter period in which to analyze the transaction and to take steps to oppose it before the parties close. That same speed may be anathema to meaningful antitrust review. Antitrust review of mergers and acquisitions is a fact- and economic-analysis-intensive process, frequently requiring review of millions of documents, retention of expert economic and industry consultants, and preparation of lengthy expert reports. Parties seeking to accomplish complex mergers

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9 Most modern understandings of antitrust treat consumer welfare as the law’s overarching goal. See Robert H. Bork, The Antitrust Paradox (Rev’d ed. 1993). Because consumer transactions are in relevant regard instantaneous, a consumer’s relationship with a firm either precedes or postdates conduct. It does not span the conduct.
10 See Thomas Jackson, The Logic and Limits of Bankruptcy Law (1986).
and acquisitions grant the enforcement agencies extensions of time beyond the statutory review periods as a matter of course.\textsuperscript{14} Meaningful antitrust review is not possible on the shorter calendar available in bankruptcy. These three effects combine to produce a likelihood of underenforcement of antitrust law relative to the optimum, with the danger that economic decline in an industry will produce inefficient industry structure leading to broader economic harms.

The conflict I identify here is serious and enduring, raising questions of the relative competencies of the bankruptcy courts applying the bankruptcy code and the federal antitrust enforcement agencies enforcing the anti-merger laws to produce an efficient allocation of a failing business’s assets. In this paper I propose approaches to reconciling this conflict that are workable within the parameters of the existing bankruptcy scheme. Because bankruptcy proceedings undermine full antitrust review of business combinations, the approach recommended here will have the effect of righting the balance. The freedom to conduct bankruptcy asset sales will be somewhat lessened while the countervailing opportunity to ensure the maintenance of competitive markets will be enhanced.

Part I gives the background of the existing substantive law and procedural mechanisms for analyzing business combinations under the antitrust and bankruptcy laws and procedures. The part analyzes antitrust merger control under Clayton Act section 7, the leading anti-merger provision in the federal antitrust laws, including (1) a discussion of pre-merger notification under the Hart-Scott-Rodino Act and the injunction process by which plaintiffs may delay or prevent harmful combinations and (2) the “failing firm” defense to a merger challenge. The Part also describes the parallel world of business combinations under the Bankruptcy Code. The part discusses Bankruptcy Code Section 363(b), which provides for the sale of assets “other than in the ordinary course of business,”\textsuperscript{15} as well as mergers conducted as part of the plan of reorganization under Code section 1123. Section 1123 requires that a plan of reorganization “provide adequate means for [its] implementation” including “transfer of all or part of the property of the estate.”\textsuperscript{16}

Part II identifies the fundamental conflict between the goals of bankruptcy law and procedure on the one hand and those of antitrust merger review on the other. That conflict’s existence suggests business combinations under section 363(b) should produce greater value for the bankruptcy estate than do those conducted as plan sales. The part continues to discuss empirical work that demonstrates the contrary reality that values

\textsuperscript{14} ABA, Merger Review Process.
\textsuperscript{15} 11 U.S.C. 363(b).
\textsuperscript{16} 11 U.S.C. 1123(a)(5).
realized in 363(b) sales lag those realized in plan sales. I offer a theoretical explanation for this surprising result and show that the harm from systemic over-reliance on 363(b) sales is greater than either a pure bankruptcy analysis or a pure antitrust analysis might suggest.

Parts III and IV discuss the optimal reconciliation of this conflict and offer solutions. Part III shows that where a conflict arises between diffuse constituents of the bankruptcy estate and diffuse consumer interests, consumers – who lack the ability to bargain \textit{ex ante} – must prevail. The part thus shows that ties should break in favor of merger enforcement policy rather than the policies of bankruptcy reorganization. Part IV discusses several practical possibilities to bring about this result, relying primarily on hypothetical amendments to the bankruptcy code, but also suggesting opportunities for change in the code’s interpretation brought about through the common-law process.

I. \textbf{Antitrust Review of Business Combinations and Bankruptcy Treatment of Antitrust Concerns}

\textbf{A. Antitrust Merger Control Under Clayton Act Section 7}

The federal antitrust laws prohibit a business combination \textquotedblleft the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly.\textquotedblright\textsuperscript{17} This anti-merger prohibition operates to preserve marketplace competition by blocking mergers that threaten undue concentration. Merger enforcement is placed in the hands of both federal and state government antitrust enforcers as well as private plaintiffs. For transactions above a certain size, pre-merger notice is required to the Federal Trade Commission under the Hart-Scott-Rodino Act, enabling the FTC or the Department of Justice to investigate and sometimes to seek injunctive relief before the merger is consummated.\textsuperscript{18}

Private plaintiff enforcement is less common in merger litigation than it is in other areas of antitrust enforcement, although private rights of action do exist and private plaintiffs do become involved in merger challenges.\textsuperscript{19} The purpose of private plaintiff enforcement in the scheme is a subject of some debate among commentators. The best

\textsuperscript{17} Clayton Act 7, 15 U.S.C. 18. Since 1950, the prohibition has applied to both stock purchases and asset purchases.

\textsuperscript{18} 15 U.S.C. 18a.

\textsuperscript{19} For one recent example, Sprint pursued litigation parallel to the Justice Department’s successful effort to block the merger between AT&T and T-Mobile.
explanation holds that private plaintiffs serve as a backstop when federal enforcement fails sufficiently to prevent or to remedy anticompetitive business combinations.20

Federal anti-merger regulation is mature. The Department of Justice and Federal Trade Commission have since 1968 collaborated on guidelines for horizontal merger enforcement that describe the agencies’ intended exercise of their prosecutorial discretion in merger enforcement.21 First promulgated in 1968 and re-issued most recently in 2010, the modern Horizontal Merger Guidelines reflect many decades of refinement in economic and legal thought. The 2010 version was drafted over two years with input by policy-makers, academics, and members of the regulated communities. The Guidelines are broadly recognized as an authoritative statement of the law governing mergers between horizontal competitors.22

The Clayton Act condemns purchases of assets or equity shares “the effect of which may tend to create a monopoly.”23 The statute regulates corporate mergers as well as acquisitions. A business combination will implicate the prohibition if, by increasing concentration, it creates opportunity and incentive for the merged firm to raise prices unilaterally or in coordination with its competitors.24 Modern interpretations of the Clayton Act recognize that harms from concentration can be mitigated if the merger increases efficiency through scale economies or productive synergies.25

B. The Failing Firm Defense

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20 A recent example of private plaintiff enforcement is the temporary restraining order sought in fall 2013 by a consumer class challenging the American Airlines and U.S. Airways merger brought in bankruptcy court after the settlement between the Justice Department and the merging airlines. Supporting the backstop theory of private enforcement, lead counsel Joseph Alioto reportedly criticized the Department of Justice for the settlement agreement. Nicholas Sakelaris, “American, U.S. Airways meet on private antitrust suit,” Nov. 20, 2013 Dallas Bus. J. (online) (copy on file with author).
22 See generally Hillary Green, Guideline Institutionalization, 48 Wm. & Mary L. Rev. 771, 776 (2006) (“The influence of this guideline system emerges from a process of institutionalization through which the guidelines become valued for more than the persuasive power of their ideas. This institutionalization process arguably has had an undue influence on the common law as courts have failed to fully engage the legal and economic substance of the guidelines.”).
24 See 2010 Guidelines s. XX, at YY.
Federal antitrust policy recognizes problems of industrial decline and poor management leading to consolidation and changes of ownership. The “failing firm” defense, recognized as a matter of caselaw, legislative history, and enforcement guideline, operates as a sort of “bankruptcy-lite” to allow mergers to proceed where the alternative is the dissipation of productive assets. The failing firm defense to a merger challenge has been recognized in federal case law since at least 1930. Congress declined to disturb it when amending the anti-merger statute, Clayton Act section seven, in 1950. The Antitrust Division and Federal Trade Commission have memorialized it in every version of the Horizontal Merger Guidelines since their inception in 1968. And academic commentators nearly universally recognize its validity.

The failing firm defense is the antitrust law’s scheme for corporate reorganization. It permits a business combination leading to otherwise intolerable

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27 Commentators disagree regarding whether the failing firm defense is economically efficient. A critic might argue that the result of approving an otherwise illegal merger always or nearly always leads to an inefficient outcome. According to this argument, the efficient outcome is the result obtained under antitrust review in the absence of the defense, and any other result must be less efficient. A proponent of the defense might argue that its application often leads to an efficient outcome, or is at the least not inefficient.

Professor Campbell makes a case for the defense’s efficiency by observing that a failing company has two choices: to exit the market or to sell out to another firm in its present market. Thomas Campbell, The Efficiency of the Failing Company Defense, ___ Tex. L. Rev. __, XX (1986). Campbell notes that critics of the defense “have not considered the other side of the balance—the consequences of letting a firm simply leave the industry.” When a failing firm departs from the market, the resources it had employed are devoted to their next best use, which could be either scrap or the manufacture of a completely different product. This causes an economic loss because the resources have less value both to consumers and to the firm in their new use than they had in their former use.” Id. at 257.

Campbell’s argument is easily shown to be flawed by recognizing that the defense operates as a one-way ratchet. The defense can permit business combinations that would otherwise be blocked to go forward but it cannot provide a basis to block combinations that otherwise would be allowed. (In other words, the lack of a failing firm is not in itself a reason to block a business combination.) The defense can only be neutral or under-enforcing on net.

28 One source dates the defense earlier than 1930. See Richard Friedman, Untangling the Failing Company Defense, 64 Tex. L. Rev. 1375, 1376 n.1 (1986). In International Shoe Co. v. FTC, 280 U.S. 291 (1930), the Court stated a two-part test for a successful failing firm defense. First, the acquired firm must be facing the grave probability of a business failure. Second, the acquired firm must have had no other prospective purchasers.
29 In Citizen Publishing Co. v. United States, involving a merger of newspaper competitors, the Supreme Court added a third element to the defense: the firm asserting this defense must also be unable to reorganize successfully in a bankruptcy proceeding. Citizen Publishing is the first explicit recognition that the failing firm defense serves as an alternative to the bankruptcy reorganization procedure for preserving the value in a declining industry.
market consolidation where reason exists to believe there is no other way to preserve the assets in the marketplace. The failing firm defense is most frequently justified by a belief that if the failing firm was exiting the market, consolidation was occurring with or without the business combination. Therefore, the business combination will not harm competition.

This syllogism is of course not air-tight both as a matter of internal logic and as a matter of a questionable premise. Logically, a buyer who purchases assets and market share at a discount is advantaged vis-à-vis its competitors, which may lead to an anticompetitive increase in market dominance. The faulty premise becomes clear when

Campbell’s argument must therefore rest on a proposition that the optimal level of merger review necessarily is less in a business combination transaction involving a failing firm. That proposition depends on either (1) a failing firm’s unique inability to bear enforcement costs or (2) an understanding that preserving a failing firm in the market is an efficient outcome in all cases, rendering any enforcement costs (including the possibility of false positive results) wasteful. Either argument, if true, might support a conclusion of a lesser optimal level of antitrust enforcement.

Both arguments are wrong if applied uniquely to business combinations involving firms meeting some form of a failing firm defense rather than generally across all business combinations. The first argument – a failing firm’s unique inability to bear enforcement costs – ignores that the cost of merger review represents a tax on business combination transactions and relief from that cost represents a tax subsidy. The defense therefore provides a subsidy favoring business combinations involving weak firms. At the margins it provides an incentive to permit failure to occur that otherwise might be avoided. The second efficiency argument holds that preserving a failing firm in the market is efficient in all cases. Under that argument, we should not tolerate antitrust enforcement costs beyond the minimum necessary to establish the application of the defense. The argument proves too much. The assumption that scrap or extra market use is less valuable than preserving the assets in the original market ignores that the firm’s failure may be because the original use was less valued than alternatives. There are few assets with such single-purpose use that their exit necessarily equates to welfare loss. The frequent example of railroad tracks as the archetype of a single purpose asset is even misguided; track beds have been repurposed as valuable public resources. See, e.g., http://www.westernmarylandrailtrail.org/WMRT/.

If preserving failing firms is efficient in all cases, no industry would be permitted to collapse – even if an industry, such as the manufacture of buggy-whips (Professor Jackson’s example. See Thomas Jackson, The Logic and Limits of Bankruptcy Law XX (1986)), has no meaningful place in a changing economy. Moreover, there is no logical inflection point at which blocking a business combination becomes inappropriate. If preserving a failing firm is per se efficient, preventing a firm from reaching the point of imminent failure can be justified and preventing a firm from even beginning its decline might also be justified. Under that logical extension of the failing firm argument, all merger review is wasteful. Few commentators have taken such an extreme position. But see Fred McChesney, Defending the Failing Firm Defense, 65 Neb. L. Rev. 1, XX (1986).

31 See Horizontal Merger Guidelines section 11, at 43 (2010).
32 Without the asset sale, the market share of the exiting firm would be shared among the remaining firms, presumably being absorbed by the remaining firm with the greatest amount of idle productive capacity.
one appreciates that whether a firm is failing, merely “flailing,” or even substantially healthy, is a question of real uncertainty. The defense is therefore narrow: according to Section 11 of the 2010 Guidelines, any offer to purchase the assets for a price above the liquidation value is a “reasonable” offer that will undermine the defense. As a former FTC official said in support of the then-existing version of the failing firm defense: “These requirements are strict. They are rarely all satisfied, and as a result, the defense is seldom successfully invoked.”

The original justification for the failing firm defense does not relate to the economic efficiency of allowing the failing firm to merge despite competitive concerns. One year after the 1929 stock-market crash, the Supreme Court took the view in International Shoe v. FTC that protecting the community in which a failing firm did business was a controlling rationale for a defense to a merger challenge:

In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure, with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser) not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public, and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act.

The Guidelines seek to control for that concern by requiring that the assets are shopped to purchasers presenting less concerns for an anticompetitive business combination. HMG section 11, at 43 & n.16.

34 Horizontal Merger Guidelines Section 11 (2010).
36 Not all commentators agree. For contrary views, see infra text accompanying notes XXX-YYY.
37 International Shoe Co. v. F.T.C., 280 U.S. 291, 302-03 (1930). The result in International Shoe is consistent with other depression-era antitrust precedents and legislation. For example, the Court’s decision in United States v. Appalachian Coals, written in the same year, allowed firms to cartelize to protect employees and communities that would have suffered if the firms had been permitted to fail. United States v. Appalachian Coals (1930). International Shoe and Appalachian Coals preceded the National Industrial Recovery Act, which also subordinated antitrust law to economic recovery goals. See generally Spencer W. Waller, Thurman Arnold: A Biography 83-84 (2005) (describing antitrust enforcement during the National Recovery Administration).
Decided nearly 40 years later in 1969, the Court’s statement of the defense in *Citizen Publishing* has become the controlling judicial formulation.38 *Citizen Publishing* involved an effort to merge the operations of competing newspapers.39 On appeal, the Supreme Court had no difficulty concluding the joint operation agreement violated the Clayton Act, but considered the argument that Citizen Publishing was a failing company. The district court had found as a factual matter that “Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing and Citizen Publishing entered into the operating agreement.”40 Recognizing the success of the bankruptcy reorganization scheme under the then-existing Bankruptcy Act, the Court added the “inability to reorganize in bankruptcy” element to the *International Shoe* rule:

[W]e know from the broad experience of the business community since 1930, the year when the International Shoe case was decided, that companies reorganized through receivership, or through Chapter X or Chapter XI of the Bankruptcy Act often emerged as strong competitive companies. The prospects of reorganization of the Citizen in 1940 would have had to be dim or nonexistent to make the failing company doctrine applicable to this case.41

Language from *International Shoe* has been misinterpreted to support an efficiency justification for the Court’s holding. See Thomas Campbell, *The Efficiency of the Failing Firm Defense*, XX Tex. L. Rev. XX, XX (1986) (citing 280 U.S. at 302-03 (“to facilitate the accumulated business of the purchaser”)). That interpretation is misguided as an historical matter – economic efficiency rationales as they have been understood since the 1970s were not part of Supreme Court antitrust precedents in 1930 – and as an interpretive matter. The relevant passage from *International Shoe* starts with the goal of avoiding “loss to . . . stockholders and injury to the communities” and continues to observe the salutary benefits of “mitigating seriously injurious consequences otherwise probable” (if the merger is not allowed). See *International Shoe*, 280 U.S. at 302-03.

38 Courts have occasionally appeared to deviate from the *Citizen Publishing* rule. Five years later the Supreme Court appeared to return to the two-element *International Shoe* framework in a merger involving coal-mining companies. The actual importance of that development in *United States v. General Dynamics* is debatable. The *General Dynamics* Court referenced the dense in passing, holding on other grounds that the merger did not violate the Clayton Act. Other courts that have ostensibly failed to follow the additional third element from *Citizen Publishing* appear to have concluded the element was inapplicable on the particular facts rather than relying on a holding that the element should not be applied.


40 *Citizen Publishing*, 394 U.S. at 137. The Court affirmed that factual conclusion: “There is no indication that the owners of the Citizen were contemplating a liquidation. They never sought to sell the Citizen and there is no evidence that the joint operating agreement was the last straw at which the Citizen grasped. Indeed the Citizen continued to be a significant threat to the Star.” Id.

41 *Citizen Publishing*, 394 U.S. at 138. The Court also noted that the burden of proving the defense was on the party asserting it and that Citizen Publishing had failed to meet its burden. Id. at 138-39.
Since *Citizen Publishing*, courts generally have included the new third element—a inability to reorganize in bankruptcy—in their statements of the defense. The Court in *Citizen Publishing* did not give a reason for adding the third element. The opinion is susceptible to a reading that the Court was generically hostile to the defense and sought to cabin it. Building on that understanding, the best justification for limiting the failing firm defense where bankruptcy reorganization is possible is that bankruptcy reorganizations are preferred to business combinations as a means to rescue a firm faced with operating challenges. One might read *Citizen Publishing* as having repudiated Depression-era precedents favoring industrial survival over consumer interests.

42 Judge Posner has argued that the inability to reorganize in bankruptcy element was inappropriate grafted onto the defense because the purpose of the defense is to keep firms from entering bankruptcy. Richard Posner, Antitrust Law XX (2d ed. 2001). Posner’s view recognizes the alternative nature of reorganization by merger and reorganization through Chapter 11. See also, e.g., Ashley J. Austin, *Food for Thought: The Efficiencies Achieved by Trimming an Industry at Overcapacity Through Mergers vs. Chapter 11 Reorganizations*, 25 Emory Bank. Dev. L.J. 147, XX (2008). Requiring an inability to reorganize as an element of the defense might thrust firms into Chapter 11 first and allow the failing firm defense only where that reorganization has proved unsuccessful.

43 See, e.g., *Citizen Publishing*, 394 U.S. at 139 (“We confine the failing company defense to its present narrow scope.”). This read of the rationale behind *Citizen Publishing* is supported by the view that the Warren Court was particularly hostile to merger activity in the 1960s. See *United States v. Vons Grocery*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (“The sole consistency that I can find is that under Section 7, the Government always wins.”).

44 This prioritizing would respect the empirical result reached by LoPucki that full reorganizations tend to produce greater long-term value than do business combinations that are not subjected to full stake-holder involvement and court review. LoPucki & Doherty, Michigan L. Rev. 2007; LoPucki, *Courting Failure* 167-80 (2005).

45 See, e.g., *Appalachian Coals Inc. v. FTC*, XX U.S. XX (1930); *International Shoe Co. v. FTC*, 280 U.S. XX (1930). This view is not a necessary interpretation: if, based on an appreciation of the empirical reality that LoPucki and others have demonstrated, *Citizen Publishing* preferred a full bankruptcy reorganization to a sale in order to return greater value to stake-holders, it may suggest a willingness to subordinate consumer interests. However, the facts before the Court did not involve a distinction between a hasty sale and a reorganization, but between a joint management and profit-sharing agreement and a reorganization. If anything, the choice the Court preferred (reorganization) subordinated stake-holder interests to those of consumers.

Modern decisions have followed the *Citizen Publishing* rule. “Since its debut in 1930, the failing firm defense has remained remarkably consistent in its formulation.” Thomas D. Fina & Vishal Mehta, *The Failing Firm Defense: Alive and Well*, Aug. 2011 Antitrust Source 1, available at americanbar.org/content/dam/aba/publishing/antitrust_source/aug11_fina_7_26f.authcheckdam.pdf. The Sixth Circuit reviewed a vertical merger in the cement industry in *U.S. Steel Corp. v. FTC*, holding that the defense was not met on the basis of the merging parties’ failure to prove an inability to reorganize in bankruptcy. Other courts have continued this trend. In *California v. Sutter Health System*, the Ninth Circuit discussed the inability-to-reorganize element in depth, finding convincing testimony by a financial expert that bankruptcy proceedings would likely result in liquidation.
C. Business Combinations Under the Bankruptcy Code

The Bankruptcy Code provides two mechanisms for allowing business combinations under bankruptcy court supervision.46 First is an out of the ordinary course of business sale of assets authorized by Bankruptcy Code section 363(b).47 Second is a plan sale under Bankruptcy Code section 1123(a).48 Either might be used in any particular case; as the bankruptcy court noted in In re Gulf States Oil Corp., “[t]he Bankruptcy Code does not provide any explicit guidance to determine when § 363(b) is the appropriate procedure and when § 1123 is the appropriate procedure.”49

First, Chapter 11 provides for bankruptcy business combinations as part of a plan of reorganization under Bankruptcy Code section 1123. The plan “shall” provide adequate means for its implementation, with the sale of estate property being one of the listed alternatives for accomplishing this requirement; in addition, “a plan may provide for the sale of all or substantially all of the property of the estate.”50 A plan sale under section 1123 protects diffuse stakeholders through detailed procedures, and requirements that must be met, for plan approval. Non-stakeholder interests are not specifically protected, but concern for the success of the plan sale ensures relevant regulatory policies become part of the bankruptcy court’s decision process on confirmation.

Second, although pre-Code law was mixed on the subject,51 modern interpretations of the Bankruptcy Code also allow business combinations under Code

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47 See infra notes XX-XX and accompanying text.
48 See infra notes XX-XX and accompanying text.
49 404 B.R. at 415.
50 11 U.S.C. 1123(a)(5)(D); (b)(4).
51 In Fidelity Assur. Ass’n v. Sims, the Supreme Court reversed the lower courts’ declining to dismiss a reorganization petition for bad faith under the then-in-force Bankruptcy Act. ___ U.S. 608, 618-19 (1943). The Court noted it was clear from the petition that reorganization could not succeed and that “Congress did not intend resort to Chapter X [the predecessor to the Bankruptcy Code’s Chapter 11] to be had for the mere purpose of liquidation.” Id. at 621. Consistent with the Court’s approach, the Third Circuit limited pre-plan asset sales t’ “emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken.” In re Solar Mfg. Corp., 176 F.3d 493, 494 (3d Cir. 1949) (giving as an example of a sufficient emergency “a warehouse of meat in storage” and a lack of “money to buy ice”). Other circuits interpreted Sims narrowly, permitting pre-plan business combinations to take place in bankruptcy. See Patent Cereals v. Flynn, 149 F.2d 711, 712 (2d Cir. 1945) (A. Hand, J.) (“[W]e think that
section 363(b), which provides for sales of estate property “other than in the ordinary course of business” with court approval after notice and a hearing. Section 363(b) provides little specific guidance as to its reach and operation. Some courts have been confused as to the differences between a plan sale and a section 363(b) sale, although the better interpretation of the statute is to consider the 363(b) sale to be available before a plan is approved and the plan sale to be available only with full plan approval.

The 363(b) sale procedure offers two substantial benefits from the perspective of the parties to a business combination transaction. First, in the normal course judicial scrutiny and stakeholder involvement is less than if the sale were conducted as part of the reorganization plan. Second, opportunities for regulatory interference, including procedures for antitrust review, are curtailed. The flip sides of both coins suggest less protection for both stakeholders and non-stakeholders depending on regulatory oversight is less in the case of a 363(b) sale than in the case of a plan sale.

Business combinations may be included in reorganization plans under Bankruptcy Code sections 1123 and 1129. A reorganization plan, including any business combination provided for, requires court approval through the process of “confirmation.” The process for achieving that approval is detailed and involved, and it can make no difference whether a sale of the debtor’s property has preceded or is made a part of the plan of reorganization.” International Bank of Miami v. Brock, 400 F.2d 833, 836 (4th Cir. 1968) (same). 11 U.S.C. 363(b). The section literally provides for sale by the bankruptcy trustee. In a Chapter 11 bankruptcy the debtor is empowered to act as a trustee. In re Golf LLC, 322 B.R. 874, 877 (Bankr. D. Neb. 2004) (noting “the distinction between the purposes of s. 363 and ss. 1123 and 1141” as one between “asset sales prior to plan approval” and “sales made pursuant to a plan”) (citing George W. Kuney, Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process, 76 Am. Bankr. L. Rev. 235, 236 (Spr. 2002)); In re Trans World Airlines, Inc., 2001 WL 1820326, at *11 (Bankr. D. Del. 2001) (distinguishing the spheres of operation of section 363(b) and 1123(a)(4)). But see In re Coastal Indus., Inc., 63 B.R. 361, 369 (Bankr. N.D. Ohio 1986) (equating non-plan sales under sections 363 and 1123(a)(d)); Matter of Wood, 47 B.R. 774, 777 (Bankr. W.D. Wis. 1985) (non-plan sales may occur under 363(b) or 1123(b)(4)); In re WHET Inc., 12 B.R. 743, 750 (Bankr. D. Mass. 1981) (permissive nature of 1123(b)(4) allows for pre-plan sales under the section).
includes required notice and a hearing, at which “any party in interest” may object to confirmation. The plan confirmation process provides for the participation of all stakeholders and imposes requirements that cabin the bankruptcy court’s discretion. That participation is provided for by a detailed scheme of rival reorganization plans, disclosure, and voting. Further protection is provided by the “feasibility” requirement: Section 1129 permits plan confirmation only if “[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor.”

A successful vote by classes of stakeholders is a necessary, but not a sufficient, condition to plan approval. A debtor seeking court approval of a plan that includes a merger also bears the burden to establish, among other requirements, that the plan is not likely to be followed by a future liquidation or reorganization – that is, that the plan is “feasible”. The feasibility requirement has been invoked when courts consider whether to confirm plans proposed to be effected by a business combination.

Feasibility is undermined in the presence of regulatory limitations that increase the difficulty of a particular constituent element of the plan. Bankruptcy courts treat the possibility of an antitrust challenge to a proposed business combination as a regulatory impediment that speaks to the question of a plan’s likely successful implementation. In In re TCI2 Holdings, a casino bankruptcy that was proposed to be resolved through a business combination faced a feasibility attack based on the prospect of antitrust challenge and a similar state-law licensure-related proceeding testing “undue economic concentration.” The bankruptcy court for the District of New Jersey engaged in a

59 11 U.S.C. 1128(a), (b).
60 11 U.S.C. 1125 (disclosure requirements); 1126 (supermajority voting); 1129 (requirements for plan confirmation). See In re Smurfit-Stone Container Corp., 2010 WL 2403793, at *10 (Bankr. D. Del. 2010) (“An asset sale pursuant to a plan of reorganization provides for a heightened degree of notice and disclosure surrounding all aspects of the sale, and allows the affected creditors to vote to accept or reject the plan, including the asset sale.”).
63 See In re River Capital Corp., 155 B.R. 382, 387 (Bankr. E.D. Va. 1991) (“the court determines that the inclusion of a merger or acquisition option does not render the plan infeasible”; overruling objections to confirmation);
64 See In re TCI2 Holdings, LLC, 428 B.R. 117, 154-56 (Bankr. 2010) (“proponents of the [plan] must also show that the new owners of the Reorganized Debtors will not face material hurdles to achieve then necessary regulatory approvals”) (court concluding plan was feasible after finding “a reasonable prospect of success . . . to achieve regulatory approval”).
65 TCI2 Holdings, 428 B.R. at 175-78.
detailed analysis of both the substance and the procedure of the likely challenges before concluding that their prospects did not undermine feasibility.66

D. Asset sales under 11 USC 363(b) and “Sub-Rosa Plans”

Bankruptcy Code Section 363(b) allows business combinations out of the ordinary course of business with court approval as part of the reorganization process.67 Although “the drafters of section 363 probably thought in terms of sales of particular assets, not entire businesses,”68 courts regularly approve business combinations under the section, even in cases as large as the Lehman Brothers and Chrysler Motors bankruptcies.69 Section 363(b) asset sales frequently are preferred by debtors and potential purchasers because they are subject to lesser interference by stakeholders in the bankruptcy estate.70 Like plan sales, section 363(b) sales can serve as “means for the plan’s implementation” under section 1123(a)(5).71

Business combinations are effected under section 363(b) with less process for challenge by stakeholders or review by regulators or other interested parties. In contrast with the detailed disclosure, voting, and confirmation requirements for business combinations effected as part of a reorganization plan, business combinations under 363(b) require “notice and a hearing.”72 In contrast with the possibility of full antitrust

66 Id. at 178.
68 LoPucki, Courting Failure, supra n.XX, at 168 (citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977)).
69 See In re Lehman Brothers Holdings Inc., 445 B.R. 143, 180-81 (Feb. 22, 2011) (discussing 363(b) sale order and citing to Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC), 576b F.3d 108, 118-19 (2d Cir. 2009)).
70 The limitation on realistic stakeholder involvement is such that some have argued that Section 363 sales are sub-rosa reorganization plans. As a famous recent example, in the Chrysler Corp. bankruptcy in 2009, Fiat S.p.A. purchased a substantial stake in Chrysler Corp. through a Section 363(b) out of the ordinary course of business asset sale, largely obviating the need for a full Chapter 11 reorganization at all. See generally Benjamin A. Berringer, “It’s All Just a Little Bit of History Repeating:” An Examination of the Chrysler and GM Bankruptcies and their Implications for Future Chapter 11 Reorganizations, 7 N.Y.U. J. L.& Bus. 361, 361-362 (2010). Section 363(b) sales offer a second advantage: to incent a sale, bankruptcy courts frequently exercise their discretion to sell the property free and clear of interests in, including liens on, the assets in question. 11 U.S.C. 363(f), (g).
71 See, e.g., Joint Plan of Reorganization, In re Seahawk Drilling Inc. et al., Bankr. S.D. Tex., Case No. 11-20089, para. 7.1, at 18 (filed May 20, 2011) (“Pursuant to the terms of this Plan, the Sale Proceeds and the proceeds from the liquidation of the Excluded Assets will be distributed to holders of Allowed Claims and Interests.”).
72 11 U.S.C. 363(b). See Smurfit-Stone, 2010 WL 2403793, at *10 (contrasting the “protections for affected parties” under 363(b) versus under a reorganization plan); In re Orfa Corp. of Philadelphia, 1991
review requiring “at least 30 days” that the District of New Jersey entertained in TCI2 Holdings, the procedures for antitrust review of a 363(b) business combination are cut approximately in half.\textsuperscript{73}

Scholars studying 363(b) business combinations have observed their impact on asset prices and potential disenfranchisement of stakeholders.\textsuperscript{74} These sales are sometimes called “sub rosa” plans, because they have the effect of wrapping up many of the issues presented by the bankruptcy proceeding without providing the due process required for plan confirmation. For this reason, courts historically were suspicious of non-plan business combinations. In an early treatment, interpreting the 1938 Bankruptcy Act, the Supreme Court held a reorganization petition filed “for the mere purpose of liquidation” was in bad faith.\textsuperscript{75} Later courts allowed pre-plan sales when the plans were found to be “fair and equitable” with reference to the pre-plan sale,\textsuperscript{76} where “justifiable cause” was present,\textsuperscript{77} or when the sale was justified by an emergency.\textsuperscript{78}

Modern courts and commenters also have recognized the danger that 363(b) sales benefit a favored bidder and management of the debtor at the expense of other bidders and stakeholders.\textsuperscript{79} Lopucki’s and Doherty’s 2007 empirical study of the effect of 363(b) asset sales concluded that “fire sales” produce less value for stakeholders than do successful reorganizations.\textsuperscript{80} A recent study by Anderson and Ma compared 363(b) sales to “plan sales” – those conducted as part of the reorganization plan,\textsuperscript{81} concluding that after controlling for other variables, 363(b) sales are associated with lower sale prices than plan sales.\textsuperscript{82} Anderson’s and Ma’s conclusion is intuitively complementary to that of Lopucki and Doherty: both chronologically and characteristically, a plan sale is more proximate to a full reorganization than is a 363(b) sale.

\textsuperscript{73} Compare 15 U.S.C. 18a(b) and (e)(2) (30-day waiting period extendable by 30 additional days at enforcement agencies’ discretion) with 363(b)(2)(B) and 15 U.S.C. 18a(e)(2) (15-day waiting period extendable by 10 additional days at enforcement agencies’ discretion).
\textsuperscript{74} See, e.g., \textit{id.} at 3-4, 8-14 (Bodoh et al.)
\textsuperscript{75} \textit{Fidelity Assur. Ass’n v. Sims}, ___ U.S. 608, 621 (1943).
\textsuperscript{76} \textit{Patent Cereals v. Flynn}, 149 F.2d 711, 712 (2d Cir. 1945).
\textsuperscript{77} \textit{In re Dania Corp.}, 400 F.2d 833, 836-37 (5th Cir. 1968) (citing 6 Collier, Bankruptcy 625 (14th ed. 1965)).
\textsuperscript{78} \textit{In re Solar Mfg. Corp.}, 176 F.2d 493, 494-95 (3d Cir. 1949) (pre-plan sales confined to emergency).
\textsuperscript{81} See \textit{infra} notes XX-XX and accompanying text.
\textsuperscript{82} Anne-Marie Anderson & Yung-Yu Ma, \textit{Acquisitions in Bankruptcy: 363 Sales Versus Plan Sales and the Existence of Fire Sales}, 22 ABI L. Rev. 1, 12, 17, & Table 5 (2014).
The empirical evidence supports the approach taken in the courts and recommended by a large number of commenters of restricting access to 363(b) sales in the absence of a “business justification.” In *Lionel Corp.*, the Second Circuit listed several factors relevant to the finding of a business justification, which centered on questions of the declining asset value, fair valuation for the asset, and prejudice to remaining issues in the bankruptcy.

Bodoh et al. point out that the *Lionel* factors will be satisfied in a large percentage of cases. Consistent with that argument, Anderson and Ma identify a trend toward nearly 100% of bankruptcy business combinations’ taking place under 363(b) rather than under a plan. Some version of the *Lionel* factors has been adopted in all the circuits that have reviewed section 363(b) business combinations.

**E. Regulatory Involvement**

1. Plan Sales

Bankruptcy business combinations conducted as part of the plan approval process are subject to more thorough regulatory review as well. (Despite the automatic stay, regulatory review of conduct by a bankrupt firm is permitted to “enforce . . . police and regulatory power.”) As the Bankruptcy Court for the District of New Jersey in *TCI2 Holdings* recognized, both state and federal regulatory issues, including antitrust considerations, were relevant to the feasibility requirement for plan confirmation. The burden of proving feasibility is on the plan proponent, who must “demonstrate[e] that achieving the necessary [regulatory] approvals is not subject to ‘material hurdles’ or readily anticipated, significant obstacles.” Courts eschew the alternative approach of requiring that the relevant regulatory hurdles be surmounted before plan confirmation.

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84 Id. at 1071. The *Lionel Corp.* factors echo considerations followed by courts under the Bankruptcy Act. See infra notes XX-XX and accompanying text.
85 Bodoh et al., supra n.XX, at 8-14.
86 Anderson & Ma, supra n.XX, at 8 & Table 1.
89 *In re Indianapolis Downs, LLC*, 486 B.R. 286, 298-99 (Bankr. N.D. Del. 2013) (court found sale transaction likely to succeed because “necessary approvals are reasonably likely to be obtained”); *In re
The detailed solicitation and voting process and the feasibility requirement for confirmation work together to ensure that plan sales serve both stakeholder and non-stakeholder interests. Stakeholders have a voice in the process and an incentive to protect their interests. Non-stakeholders are protected by regulatory policy external to bankruptcy law, including antitrust, which bankruptcy courts must consult when deciding whether to confirm the plan. Finally, the frequent reality of dissenting stakeholders with incentives to prevent confirmation ensures regulators will be made aware of any potential for challenging its terms.

a. Pre-Merger Review

One such regulatory consideration is antitrust review of the business combination by the FTC or DOJ. Under the Hart-Scott-Rodino Act, business combinations meeting certain dollar thresholds must be disclosed to the Federal Trade Commission and Department of Justice before a transaction is consummated. Outside of bankruptcy, a reportable business combination may not be consummated until at least 30 days after reporting, permitting the FTC or DOJ to investigate the transaction and the market to determine whether to bring a challenge. The statute also gives the investigating agency discretion to seek an additional 30 days for review of submissions made in response to a “second request” for documents or testimony. The Hart-Scott-Rodino Act is thus said to provide a 30+30 day waiting period prior to consummation. In practice, because the parties to the combination must comply with the request for documents and testimony before the additional waiting period begins, the investigating agency frequently enjoys 90 days or longer to investigate and to prepare a challenge to the combination.

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90 See Indianapolis Downs, 486 B.R. at 298 (“courts have not typically held up confirmation of a plan to wait for issuance of [regulatory] approvals”).

91 Creditors frequently use challenges for feasibility in efforts to prevent plan confirmations, including where plans involve sales or mergers of the debtor’s business. See, e.g., In re River Capital Corp., 155 B.R. 382, 387 (Bankr. E.D. Va. 1991) (feasibility challenge unsuccessful);


93 15 U.S.C. 18a(b) (30-day waiting period). Challenges, when they occur, take the form of applications for temporary restraining orders followed by injunction proceedings. See, e.g., 15 U.S.C. 53(b).

Plan sales do not alter the requirements of the Hart-Scott-Rodino Act. Compliance with regulatory requirements is essential to establishing that the plan is “feasible,” or “not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan.” In practice, when a plan is confirmed that contains a business combination that exceeds the filing threshold, the parties to the combination must make a filing with the Federal Trade Commission and permit the waiting period to expire before consummating the transaction. This practical reality suggests that when a business combination presents antitrust concerns, it should be unlikely to succeed under a reorganization plan. The bankruptcy court will be concerned at the confirmation stage with both the certainty of at least 60 days’ delay and the uncertainty regarding the outcome of the expected antitrust challenge.

b. Failing Firm Defense

A challenge to a plan sale is, like any full antitrust review of a business combination, subject to the failing firm defense. Where the merging firms can demonstrate (1) imminent equity insolvency, (2) inability successfully to reorganize in Chapter 11, and (3) unsuccessful good-faith efforts to elicit reasonable alternative offers, that showing will favor the plan sale’s being permitted to proceed. The fact of an extant Chapter 11 proceeding will facilitate, rather than undermine, the application of the failing firm defense, because relevant evidence should exist with regard to the second element.

Likewise, under the feasibility standard for plan confirmation, the likely success of a proposed plan sale will require the bankruptcy court to evaluate the likely success of the failing firm defense as part of its determination of the likely outcome of merger review. A bankruptcy court should be uniquely well equipped to address the three elements of the defense. The financial affairs of the debtor, the likely success of a reorganization in the absence of the plan sale, and alternative purchasers for the debtor

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95 11 U.S.C. 1129(a)(11); In re TCI2 LLC, 428 B.R. at 175-78.
96 Professor LoPucki suggests that feasibility concerns have taken a back seat to other considerations as part of bankruptcy courts’ competition for large cases. Because section 363(b) asset sales present an alternative approach to business combinations that is more likely to evade regulatory review, courts need not risk plans’ failure in order to accomplish debtors’ desired business combinations. See infra notes XX-XX and accompanying text.
97 See supra notes XX-XX and accompanying text.
company are factual questions core to the bankruptcy court’s charge in a particular case, as well as its general expertise.  

2. “Other than in the Ordinary Course of Business” Sales

In contrast with plan sales, the speed, limited notice, and presumed emergency nature of a section 363(b) sale undermine regulatory review of a business combination effected under that section. Notice to stakeholders of section 363(b) sales is limited to 21 days “unless the court for cause shown shortens the time.” Because of Lionel – or comparable binding authority in a particular jurisdiction – the fact of a business combination’s being approved under 363(b) almost by definition suggests the court’s determination that hasty resolution of the transaction is needed. Scholarship supports the proposition that courts regularly accept arguments that debtors in Chapter 11 may “melt like ice cubes.” According to the leading empirical study of section 363(b) sales conducted as part of a Chapter 11 proceeding, more than half of such business combinations that take place in large public company bankruptcies are supported by an argument that the debtor’s assets were wasting.

As discussed below, opportunities for regulatory review of a 363(b) sale are also limited. Taken together, limited notice and opportunity for stakeholder involvement and limited opportunity for regulatory intervention undermine the interests of both stakeholders and non-stakeholders.

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98 Questions remain whether a bankruptcy court is appropriately incentivized to make these findings in the light of the policy underlying antitrust review of business combinations. I address those questions in Part III, infra.

99 Some indication exists that experienced antitrust counsel appreciate, and may take advantage of, this reality. See infra notes XX-XX and accompanying text (discussion of Sungard/Comdisco merger and Comdisco Inc. bankruptcy). If that is so, the value of the section 363 sale should increase as the regulatory risk from active merger enforcement increases. It would be an interesting exercise to study reliance on section 363 to facilitate mergers during periods of active versus less-active federal merger enforcement – for example, the Bush administration compared to the Obama administration.

100 Fed. R. Bankr. P. 2002(a)(2). By default, objections must be made “not less than seven days before the date set for the proposed action” (Rule 6004(b)), creating a 14-day or shorter period after receiving notice to make objection.

101 Melissa Jacoby & Edward Janger, Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy, 123 Yale L.J. XX, XX (2014) (“the Lionel standard has evolved to provide a blueprint for hurry up sale motions”).


104 See generally John D. Ayer et al., The Intersection of Chapter 11 and Antitrust, 25 ABI L.J. 18, [Westlaw version at 2-3] (2006) (discussing the merger review process when the target entity is in bankruptcy).
a. Antitrust Review

Section 363(b)’s text and amendment history provide evidence that Congress contemplated a need for speedy resolution to these “other than in the ordinary course of business” business combinations. Recognizing the possibility that pre-merger notification may be required under the Hart-Scott-Rodino Act, Congress amended section 363(b) in 1984 and 1994, adding waiting periods for antitrust review by the FTC or DOJ. The amendments provided for half of the usual waiting period before a transaction may be consummated – 15 instead of 30 days – and allowed an extension up to 10 days for further investigation, compared with the usual extension of 30 days. The foreshortened waiting period for antitrust review applicable to section 363(b) business combinations mirrors the shorter waiting period for transactions in the nature of cash tender offers governed by the Williams Act. (Shorter waiting periods for antitrust review of transactions governed by the Williams Act are explained by that statute’s sixty-day limit on firm offers.)

Antitrust concerns are most likely to arise where the purchaser in a business combination conducted under section 363(b) is from within the debtor company’s industry rather than financial firms or other non-industry speculators. Such an intra-industry business combination presents the kind of competitive “overlap” that implicates

106 Pub. L. No. 98-353, § 442(b), 98th Cong., 2d Sess., 98 Stat. 333 (1984); Pub. L. No. 103-394, § 109, 103d Cong., 2d Sess., 108 Stat. 4106 (1994). Prior to the 1994 amendments, the only waiting period recognized by the Bankruptcy Code was a 10-day period after notification. Dispute arose as to whether that 10-day period was extendable by 30 days on the issuance of a second request. See generally Robert B. Greenbaum & Alan J. Meese, Premerger Review and Bankruptcy: The Meaning of Section 363(b)(2), Fall-Antitrust 35, 35-36 (1993) (describing the dispute and favoring the no-extendability position); James M. Spears, Federal Merger Enforcement in Bankruptcy, Spring-Antitrust 19, 20-21 (1992) (arguing the extendability position). In the 1994 amendments, Congress split the difference, moving to an automatic 15-day waiting period that was extendable by an additional 10 days on the issuance of a second request.
109 Neither the bankruptcy code nor its amendments explains the reason for matching the section 363(b) waiting periods to those for cash tender offers. Testimony before Congress during the consideration of the Hart-Scott-Rodino Act explains the shorter waiting periods for cash tender offers: “The offering company must, under the Williams Act, accept tendered stock within 60 days of tender, or risk [the offer’s] withdrawal.” Hearings before the Subcommittee on Antitrust and Monopoly, 94th Cong., 2d Sess., at 71 (1976) (testimony of Eleanor Fox). Consistent with Professor Fox’s understanding in 1975, since 1968 Williams Act § 14(d)(5) has permitted a tender offer to be withdrawn “at any time after sixty days from the date of the original tender offer.” 15 U.S.C. 78n(d)(5). See generally Arnold S. Jacobs, The Williams Act – Tender Offers and Stock Accumulations § 4.19 (discussing the 1968 adoption and legislative history of section 14(d)(5)).
the federal anti-merger laws. A substantial percentage of 363(b) sales meet that characteristic. According to one empirical study,

Our data set confirm [the] intuition that companies from within the debtor’s industry would be the most likely purchasers at bankruptcy sales. We found that two-thirds of buyers were ‘strategic’ in that they planned to use the assets in conjunction with their own businesses; only one-third were ‘financial’ investors seeking a profit on the purchase.

In cases in which antitrust concerns do arise, intuition and anecdotal evidence suggest the shorter periods for antitrust review undermine agency challenge to the business combination. On the basis of antitrust concerns, the Department of Justice opposed Sungard’s purchase of the assets of its competitor Comdisco Inc. through a section 363(b) sale conducted under the control of the bankruptcy court in Chicago.

In an article published shortly after the Sungard/Comdisco transaction closed, counsel to SunGard recognized the value to the federal antitrust authorities of “sufficient time to conduct the review and evidence-gathering that the staff feels is necessary to convince the decision-makers in the Agencies (and ultimately a court) that the merger should be enjoined.” Counsel described a strategy of a “time squeeze,” “forc[ing] the agency to choose between having to file suit before it is ready and allowing the transaction to be consummated.” And noting the truncated waiting periods applicable to the 363(b) sale procedure, counsel continued: “the speed with which SunGard was able to complete its submission left the DOJ with less time to prepare for litigation.” Statements by the Antitrust Division support counsel’s view as to the success of the time squeeze strategy:

The United States has conducted an accelerated review of this matter. An investigation was opened on August 18, 2001 and the parties submitted their Hart-Scott-Rodino filings three days later. The United States rapidly served subpoenas on the parties, conducted numerous interviews and reviewed hundreds of boxes of

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111 LoPucki & Doherty, supra n.XX, at 28-29.
112 Conversations with experienced practitioners support the intuition that reduced preparation time will lead to reduced success in antitrust challenges.
113 Stephen M. Axinn, Merger Review and Litigation Involving the Acquisition of Bankrupt Companies, Summer 2002 Antitrust 74, 74.
114 Id.
115 Id. at 75.
documents. By way of comparison, a typical investigation of this complexity takes four to five months.\textsuperscript{116}

The result in the SunGard/Comdisco business combination was an unsuccessful merger challenge that allowed the 363(b) sale to proceed.\textsuperscript{117}

b. Failing Firm Defense

Antitrust review of a business combination effected under section 363(b) is subject to the failing firm defense to the same extent as is any other merger transaction. For one example, when Hercules Offshore, Inc. purchased Seahawk Drilling Inc. in a section 363(b) business combination, the parties asserted a failing firm defense on the basis of Seahawk’s financial distress.\textsuperscript{118} According to an article written by counsel representing the acquiring company, the failing firm defense was the basis for the Department of Justice’s decision to close the investigation without a challenge.\textsuperscript{119}

In the 2011 Seahawk 363(b) sale, the Justice Department closed its investigation and “early termination” was granted on March 30, permitting the parties to consummate the transaction.\textsuperscript{120} The bankruptcy court approved the 363(b) sale on April 5.\textsuperscript{121} The bankruptcy court was relieved of any need to investigate the likely success of the defense


\textsuperscript{118} Fina & Mehtal, supra note XX, at 3-4. See generally “Hercules Offshore Buying Seahawk’s Assets,” Feb. 12, 2011 Houston Chron., available at \url{http://www.chron.com/business/energy/article/Hercules-Offshore-buying-Seahawk-s-assets-1693118.php} (describing agreement, bankruptcy filing, and cause for Seahawk’s financial difficulty);


\textsuperscript{121} See Hercules Offshore Inc., Form 8-K, Apr. 5, 2011, at 2 (describing the bankruptcy court approval and the transaction).
by the early termination of the antitrust investigation. The timeline of the Hercules/Seahawk transaction demonstrates a practical distinction between a business combination effected by a plan sale versus a 363(b) sale. In the first instance, the bankruptcy court will confirm the plan on the basis of an evaluation of the likelihood of the success in as-yet-unfinished regulatory review. In the second instance the bankruptcy court will await the outcome of regulatory review before approving the sale. In the example case of the Hercules/Seahawk Drilling business combination, the bankruptcy court order approving the sale motion did not address the regulatory issues except to observe the provision of notice to “the state and federal units.”

The early termination of the antitrust merger review successfully sought in the Hercules/Seahawk transaction is a common feature of 363(b) sales. Cross-referencing the Federal Trade Commission’s database of early termination notices with the UCLA-LoPucki Bankruptcy Research Database shows that in a sizable percentage of business combinations effected under 363(b) the parties achieve early termination. (The great lion’s share of all merger investigations in a given year are resolved through early termination. For example, in 2013, early termination was granted in a total of 797 of 1326 business combinations for which filings were received. Those include business combinations conducted in the context of large and politically salient bankruptcies such as Lehman Brothers, Adelphia Communications and Enron Corp., which one might expect in the ordinary course to draw some degree of pre-merger investigation, if only as a matter of the optics of too-easily allowing mergers in high-profile industries. Details of those investigations apart from the fact of early termination are not made public, but in cases like Lehman Brothers, Enron, and Adelphia Communications, it is likely the antitrust enforcement agencies were motivated by failing firm arguments.

The chronology of events for a business combination effected under section 363(b) raises a question whether the failing firm defense is appropriate in any instance for

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123 Colloquially called “ET”s.
such a transaction. The defense requires a demonstration that the bankrupt firm “would not be able to reorganize successfully under Chapter 11.”

The nature of a section 363(b) sale is that the bankrupt debtor does not attempt to reorganize its business in Chapter 11. Instead, the debtor files Chapter 11 with the intention of selling the company. For one representative example, Seahawk Drilling stated to the bankruptcy court in 2011, it “filed these Chapter 11 bankruptcy cases to effectuate the terms and provisions of the [asset purchase agreement].”

3. Non-Reportable Transactions

Some transactions raising antitrust concerns are not subject to mandatory reporting and waiting periods for federal agency review before they are consummated. Several tests for reportability exist, all turning in some manner on the size (in terms of dollar values) of the parties or the size of the transaction. An example is the sale of Gulf States Steel assets in a 363(b) sale conducted as part of Chapter 7 liquidation proceedings. Although an unsuccessful bidder raised the specter of antitrust concerns based on the involvement of a dominant competitor in the winning bidder consortium, the antitrust enforcement agencies did not review the $6.3 million transaction.

Whether those non-reportable business combinations occur in or out of bankruptcy, they may be concluded before agencies have the opportunity to review and if appropriate move to block them. Remediing consummated mergers presents a unique challenge referred to as “unscrewing the egg,” a colorful expression invoking the challenges of recreating competition once assets and operations have been combined and

128 2010 Guidelines s. 11, at 43.
129 Debtors’ Emergency Motion, Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code para. 12, at 7, In re Seahawk Drilling Inc. et al., Bankr. S.D. Tex., No. 11-20089, Dkt. No. 19 (filed Feb. 12, 2011). Evidence suggests this is more common than rare. See generally Lynn LoPucki, Courting Failure, supra note XX, at 168-69 (in many cases 363 sales are the reason for the bankruptcy filing).
130 See 16 C.F.R. Parts 801-03.
competitively sensitive information has been exchanged.\textsuperscript{135} The result is that except in rare cases, a consummated business combination cannot meaningfully be remedied.\textsuperscript{136}

Intuition suggests the more substantial proceedings involved in achieving bankruptcy court approval of a plan sale\textsuperscript{137} renders non-reportable business combinations more likely to come to the advance attention of the enforcement agencies. For example, dissenting creditors might find alerting the antitrust authorities to the proposed business combination to be a profitable strategy to undermine the plan. In contrast, rapid business combinations conducted under section 363(b), conducted without meaningful creditor involvement and perhaps even with a lack of meaningful court review,\textsuperscript{138} are more likely to escape the notice of the enforcement agencies.

II. CONFLICTING SCHEMES

The prior Part explained the legal and regulatory framework for the treatment of merger claims in and out of bankruptcy. In Part II, the paper demonstrates how those rules and procedures create conflicts in which antitrust goals are subordinated to bankruptcy policies favoring the constituents of the estate.

A common result of business bankruptcies is the sale of the firm in bankruptcy.\textsuperscript{139} Increasingly commentators observe that the sale of the firm may be the purpose of the

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\textsuperscript{135} As an indication of the challenges inherent in this process, the Department of Justice criminally prosecutes “gun-jumping,” or proceeding with a merger transaction before the Hart-Scott-Rodino waiting periods have expired. \textit{See generally} Richard Liebeskind, \textit{Gun-Jumping: Antitrust Issues Before Closing the Merger}, ABA Section of Business Law, Antitrust Committee (2003), available at pillsburylaw.com/siteFiles/Publications/16ADC9E2C53CF6E9F97E3F0A3F6F3242.pdf.

\textsuperscript{136} \textit{See} Federal Trade Commission, \textit{Guide to the Antitrust Laws: Mergers,} available at http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers (“The \textbf{premerger notification requirements} of the Hart-Scott-Rodino Act allow the antitrust agencies to examine the likely effects of proposed mergers before they take place. This advance notice avoids the difficult and potentially ineffective "unscrambling of the eggs" once an anticompetitive merger has been completed.”).

The unscrambling the egg concern is less likely to arise in a pure acquisition as opposed to a merger context. In \textit{Gulf States}, the winning consortium later sold the assets for a substantial profit. \textit{See} Dreher, \textit{supra} n.XX, at 1. Such a re-marketing demonstrates the business operations of the bankrupt debtor were never meaningfully combined with the purchaser, and an antitrust challenge could have remedied an illegal merger (had it been found to occur).

\textsuperscript{137} \textit{See} \textit{supra} notes XX-XX and accompanying text.

\textsuperscript{138} \textit{See} \textit{supra} notes XX-XX and accompanying text.

\textsuperscript{139} According to the UCLA-LoPucki Bankruptcy Research Database, over the decade from 2004-2013, from 17\% to 42\% of all large public company bankruptcies disposed of each year was concluded with a section 363(b) sale of all or substantially all assets. \textit{See} “363 Sales of All or Substantially All Assets,” UCLA-LoPucki Bankruptcy Research Database, available at http://lopucki.law.ucla.edu/tables_and_graphs/363_sale_percentage.pdf.
\end{flushleft}
bankruptcy filing. Prominent defenders of that result argue that bankruptcy sales move assets to their highest value use, while leading critics argue that section 363(b) sales of an entire firm benefit purchasers and insiders to the prejudice of diffuse stakeholders. Existing scholarly commentary fails to consider the question treated in this article: the impacts of sales of firms in bankruptcy on non-stakeholders (like consumers) or on external regulatory policy (including antitrust).

A. Bankruptcy Business Combinations Are Intended to Maximize Value for Investor Interests

“The purpose of a § 363(b) sale is to maximize the benefit to the debtor’s entire estate.” Commentators agree. In spite of their conflicting arguments and conclusions, leading theorists and empirical scholars studying 363(b) sales start from the same initial premise that the bankruptcy reorganization process is intended to maximize the value of the firm’s assets. “In the same spirit” as Ronald Coase’s baseline premise in The Nature of the Firm, to prominent bankruptcy commentators writing in the law-and-economics tradition contended in 2002 that bankruptcy “reorganization law ought to begin by ascertaining the value of keeping particular assets together inside a given firm.” Their conclusion that bankruptcy asset sales are appropriate substitutes for reorganizations relies on the premise that in the modern economy most assets are not firm specific, so value may be maximized by bankruptcy asset sales. The most prominent dissenters from that view nonetheless also see the core question of Chapter 11 as maximizing value. They observe with regard to judicial supervision of bankruptcy sales,

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140 Baird & Rasmussen, The End of Bankruptcy, 55 Stan. L. Rev. 751, 751 (2002) (citing as a lead example the TWA bankruptcy); LoPucki, Courting Failure 169 (also citing the TWA bankruptcy).
142 LoPucki & Doherty, 106 Mich. L. Rev. 1, 10 (2007) (reporting the empirical result that section 363(b) sales produce depressed value for assets). Anderson & Ma recently showed that LoPucki and Doherty’s empirical result was limited to 363(b) sales rather than plan sales. Anderson & Ma, 22 ABI L. Rev. 1 (2014).
143 Other external regulatory policies exist as well. For example, the FCC has become involved in review of bankruptcy asset sales that implicated broadcast license ownership regulations. See Ilene K. Gotts et al., US Antitrust and FCC Treatment of Acquisitions of Distressed Communications Businesses, 6 Comp. L. Int’l 11, 14-15 (2010).
146 Baird & Rasmussen, supra n.XX, at 758.
147 Baird & Rasmussen, supra n.XX, at XX-YY.
148 LoPucki & Doherty, supra n.XX, at 3.
“[b]ankruptcy law charges bankruptcy judges with the responsibility to prevent inadequate price sales.”149

For example, after American Airlines had spent a year reorganizing in Chapter 11 bankruptcy and had returned to profitability, in late March 2013 the bankruptcy court first approved a business combination transaction in which US Airways proposed to acquire American Airlines.150 Final approval of the 363(b) sale to US Airways came after the Justice Department settled its challenge to the combination and the bankruptcy court approved the Chapter 11 plan.151 Observers note that the US Airways/American Airlines combination has led to further consolidation in an already consolidated industry.152

Other examples include the sale of Chrysler Corp. to Fiat SpA in 2009;153 American Airlines’ purchase of bankrupt Trans-World Airlines in 2001;154 Sungard Data Systems’ purchase of competitor Comdisco Inc. in 2002 over Justice Department objection;155 and the 1991 sale of the Financial News Network to General Electric, the owner of the Consumer News and Business Channel, in a business combination that produced a monopoly in a market for consumer financial news.156

Bankruptcy is lauded for facilitating these transactions and thereby preserving the going concern value of the enterprises. The asserted benefits are two-fold: First, by selling (for example) bankrupt American Airlines as a going concern, a bankruptcy court maximizes the value of American. As a going concern American Airlines was worth the discounted value of expected future profits. In liquidation the asset value is limited to the aggregate of tangible and semi-tangible inputs, which have limited viable alternative uses. The value maximizing result is good for investors in American Airlines, a class that includes creditors, employees, equity investors, contracting partners, and the communities in which American Airlines facilities are located, among others.

Second, by selling American as a going concern, the broader economy benefits through the maintenance of a productive business. In the absence of a bankruptcy sale,

149 Id. at 3.
150 In re AMR Corp. et al., ___ (Bankr. S.D.N.Y. 2013).
152 See Comments of the American Antitrust Institute et al., United States v. US Airways (submitted Feb. 7, 2014) (settlement fails to remedy the increased consolidation in the airline industry).
American may have ceased operations.\footnote{Evidence points to the contrary, which may explain why American and US Airways did not assert a failing firm defense to the Justice Department’s complaint to block the merger. \textit{See Answer, United States v. US Airways et al., ____ (D.D.C., filed 2013).}} Had that occurred, American would not be flying airplanes; people would not be employed in running American’s business; contracting partners and communities would be impacted; creditors would go unpaid; and the assets that went into the American Airlines organization would be dissipated to the four winds, possibly re-deployed to lower value uses. The same two-part justification holds for any business combination transaction in which one firm’s failure is a realistic consequence of the transaction’s failure, including some percentage of business combinations conducted under protection of the bankruptcy court.\footnote{\textit{See, e.g., In re Trans-World Airlines, 2001 WL 1820326, at *14 (Bankr. D. Del. Apr. 2, 2001) (“there is a substantial public interest in preserving the value of TWA as a going concern and facilitating a smooth sale of substantially all of TWA’s assets to American. This includes the preservation of jobs for TWA’s 20,000 employees, the economic benefits the continued presence of a major air carrier brings to the St. Louis region, and preserving consumer confidence in purchased TWA tickets American will assume under the sale.”).}}

\textbf{B. Bankruptcy Business Combinations May Present Antitrust Concerns}

Antitrust law’s anti-merger provision, Clayton Act section 7,\footnote{15 U.S.C. 18(a) (rendering illegal mergers or asset sales that would “tend to create a monopoly”).} is also implicated by these business combination transactions. Before combining in 2014, US Airways and American Airlines were two of five remaining major domestic air carriers operating in an industry with oligopoly characteristics, including price leadership and demonstrated limited willingness to compete head-to-head in city-pair routes.\footnote{Complaint, \textit{United States v. US Airways et al., ____}, para. 3 (D.D.C., filed 2013).} The merger presented substantial competitive concerns.\footnote{\textit{See U.S. Department of Justice & Federal Trade Commission, Hart-Scott-Rodino Annual Report 12-13 (FY 2013) (“The complaint alleged that the transaction, as originally proposed, would substantially lessen competition for commercial air travel and result in passengers paying higher airfares and receiving reduced service. In addition, the transaction would reduce competition in the market for slots at National Airport where the merged carrier would control almost 70\% of the slots.”).}} The level of consolidation in the airline industry in the wake of that merger is sufficiently great that it can be expected to be functionally irreversible in the absence of dramatic industry shake-up.\footnote{\textit{See Danielle Kurtzleben, “Regulators Sue to Stop American Airlines-US Airways Merger, but Why Now?”, USA Today, Aug. 13, 2013 (quoting this author: “My instinct is we’re reaching that tipping point . . . When you get down to four airlines that effectively own air service in the U.S., these players are too big for any new entrants to come in and be a serious competitive threat going forward.”), available at http://www.usnews.com/news/articles/2013/08/13/regulators-sue-to-stop-american-airlines-us-airways-merger-but-why-now. It is difficult to imagine what changes might suffice, but technological innovations comparable to the Internet’s replacing home operating systems as consumers’ primary means of electronic interface may be required.}
American Airlines’ purchase of bankrupt Trans-World Airlines in 2001 was on its face likewise a matter of competitive concern. Both American and TWA were nationwide legacy carriers with route systems concentrated around Midwest U.S. hubs (St. Louis for TWA, Chicago for American) and with significant trans-Atlantic presences.\(^{163}\) Statements entered into the record at a February 2001 senate hearing on airline consolidation noted substantial concerns for increasing consolidation in the airline industry.\(^{164}\) According to testimony entered into the record by the General Accounting Office, on some metrics the American-TWA business combination presented greater concerns than did proposed (non-bankruptcy) business combinations of airlines including United/US Airways and Northwest/Continental Airlines, both of which failed after Justice Department opposition.\(^{165}\) TWA entered bankruptcy specifically to facilitate a business combination that had been planned in advance of TWA’s filing.\(^{166}\)

Sungard’s purchase of Comdisco was a 3-2 business combination in a market for “[s]hared hotsite services for large scale enterprise computer processing centers,”\(^{167}\) with the combined company expected to control 71% of the market.\(^{168}\) The Justice Department further alleged that Sungard and Comdisco were “viewed as the two closest, and sometimes the only, bidders.”\(^{169}\) An already concentrated market became a duopoly over a lawsuit by the Justice Department seeking injunctive relief. The bankruptcy business combination was approved although Hewlett Packard Corp. was a competing


\(^{164}\) See Effects of the American Airlines/TWA Transaction and Other Airline Industry Consolidation on Competition and the Consumer, Sen. Hrg. 107-1094 (Feb. 1, 2001). Most of the comments favored the merger because of concerns for lost economic value and jobs and other effects of liquidation, although a few found the concerns for consolidation to exceed the harms from liquidation.


\(^{166}\) See LoPucki, Courting Failure, supra n.X, at 169.


\(^{169}\) Compl. para. 26.
bidders for the bankrupt Comdisco Inc. Had Hewlett-Packard purchased the assets, the competitive concerns would largely have been obviated.

Financial News Network’s 1992 sale to General Electric, the parent company of CNBC, was a merger to monopoly. At the time the two were the only 24-hour financial news broadcasters – FNN had pioneered the now-common concept of news with a stock ticker across the bottom of the screen. Such mergers to substantial concentration threaten consumer harm as the surviving firms gain the power to control prices, quality, choice, and the level of output.

Theory suggests that bankruptcy sales will occur most frequently where competitive overlaps exist. A sale of a company that must be conducted quickly is most likely to attract buyers with expertise in the relevant industry because of their information advantage. If an effort is made to maximize the value received at the sale, buyers standing to gain from synergies between the business of the bankrupt debtor and their own business will place a premium on the company for that reason. Likewise, buyers who anticipate acquiring market power by combining the bankrupt debtor’s capacity and market share with their own will place a premium on the company for that reason. The theory is supported by empirical fact. In their study of 363(b) sales, LoPucki and Doherty’s found that “data confirm the intuition that companies from within the debtor’s industry would be the most likely purchasers at bankruptcy sales. We found that two-thirds of buyers were ‘strategic’ in that they planned to use the assets in conjunction with their own businesses . . . .”

C. Categorizing Conflict Cases

In analyzing the conflict between bankruptcy law’s reorganization objectives and antitrust law’s competition concerns, it is useful to categorize business combination transactions in which both issues are present. In one category of cases the reorganization objectives can be accomplished without prejudice to competition concerns through a business combination with a competing bidder. In a second category of cases reorganization objectives can be accomplished without any business combination’s taking place. In a third category of cases reorganization objectives can only be achieved through a business combination transaction. It is only in this third category that the

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171 CITE.

172 Out of industry buyers will need to bear time and cost to compete in the bidding process.

173 LoPucki & Doherty, supra n.X, 106 Mich. L. Rev. at 28-29. This phenomenon has been observed historically as well. See id. at 12 (noting a similar conclusion from a study using data from the 1980s).
tension between bankruptcy and antitrust may be irreconcileable. The third category also implicates the antitrust law failing firm defense.

1. Competing Bidders

Cases exist in which the business combination that took place was unnecessary to accomplish the economic goals of the bankruptcy reorganization. A competing bid may have presented lesser competitive concerns. Hewlett Packard challenged the bankruptcy court’s approving the Sungard-Comdisco merger because it would have liked to purchase Comdisco in order to enter the market as a competitor, preserving the pre-combination level of competition while also ensuring the assets remained in the market. Dow Jones and Westinghouse fought the CNBC-FNN merger because those firms would have liked to buy Financial News Network.

These cases demonstrate the conflict between bankruptcy and antitrust, because the bankruptcy court sought the strongest of the available bids, even where those strongest bids presented greater competitive concerns. Bankruptcy courts have limited incentive to consider the less anticompetitive alternative transaction.174

2. No Business Combination Necessary

A business combination may be unnecessary to preserve the bankrupt firm’s assets in the marketplace. American Airlines had successfully reorganized in Chapter 11, returning to profitability, before the bankruptcy court approved the US Airways business combination. This category might frequently involve a firm that reaches an agreement to enter a business combination transaction and files bankruptcy to facilitate the combination.175

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174 One counterintuitive result of the LoPucki/Doherty study might be that a slower sale process would serve both the interests of bankruptcy and those of antitrust better than a fire-sale approach. A longer shopping period for the bankrupt debtor might engage the antitrust enforcement agencies earlier; might enable purchasers who present lesser competitive concerns to evaluate and participate in the bidding; and might diminish management preference for 363(b) sales over plan sales, causing more business combinations to take place through the antitrust-deferential plan sale process. At the same time, LoPucki’s and Doherty’s work, together with Anderson’s and Ma’s recent article, suggest the goals of estate value maximization would be better accomplished under such an approach.

175 Filing to facilitate the business combination is not always an indication that the business combination is unnecessary to preserving value. For example, the American Airlines/Trans-World Airlines business combination and that of Seahawk Drilling Inc. and Hercules Offshore Inc. both were true failing firm stories but also both involved a bankruptcy filing specifically intended to facilitate the business combination. See supra notes XX-XX and accompanying text. See also, e.g., Fina & Mehta, supra, at 4 (describing the Hercules/Seahawk business combination undertaken as an asset sale under Bankruptcy...
According to empirical work by LoPucki and Doherty, this category is implicated in a fair number of 363(b) sales. LoPucki and Doherty analyzed 30 363(b) sale transactions and concluded that the value produced in those “fire sales” was substantially less than the value produced by a Chapter 11 reorganization. A possible corollary of that conclusion is that in a fair number of 363(b) sales, the fire sale was not necessary to effectuate the value-maximizing purposes of bankruptcy; a plan sale or a full reorganization might have been a superior approach.

3. Irreconcilable Conflict: Anticompetitive Combination Essential to Reorganization

In other cases, some form of asset sale or merger conducted under a bankruptcy court’s supervision may be necessary to preserve the value of the firm. It is unlikely that TWA could have emerged from its 2001 bankruptcy filing to provide air passenger service as a free-standing firm. As the bankruptcy court found, “In TWA’s case, a sale pursuant to § 363 is the only viable alternative for preserving and capturing the enterprise value of TWA’s assets.” Evidence suggests no suitors were realistically available other than American. In general, transactions in this third category include those in

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177 2007 Michigan Law Review at XX.
178 Anderson and Ma followed up LoPucki and Doherty’s study by comparing the results of 363(b) sales with those of plan sales, finding that plan sales return substantially more to the stakeholders than do 363(b) sales. ABI Law Review (2014). That conclusion suggests that a later sale and a reorganization both are viable alternatives to many 363(b) sales.
180 In re Trans-World Airlines, 2001 WL 1820236, at *12 (Bankr. D. Del. Apr. 2, 2001); see id. at *14 (“Given TWA’s precarious financial history, I found that a rejection or denial of the Sale Motion would have resulted in an immediate and precipitous decline in the financial affairs of TWA with a very high probability, if not certainty, of liquidation. A liquidation would result in material adverse harm to TWA’s diverse creditor constituencies and loss of enterprise value.”); J. Bruce McDonald, “Antitrust for Airlines,” Remarks before the Regional Airline Association 9 (2005).
181 Testimony of William F. Compton, President and CEO, Trans-World Airways, before the Senate Committee on Commerce, Science and Transportation, id. (“Only American Airlines saw fit this winter to come forward with a proposal that was not merely an offer to cherry-pick a prized asset here or there. American proposed a comprehensive solution that will realize for our creditors the value of TWA as a going concern.”). Other potential bidders, including Continental Airlines and a group including financier
which both (1) no other bidder is available and (2) a sale of the bankrupt firm is the only possibility for maintaining the assets operating in the market of concern.

Transactions with these characteristics satisfy both bankruptcy goals, which seek to maximize estate value, and antitrust goals, which seek to preserve assets in the market rather than to permit the value lost by out-of-market liquidation proceedings. These transactions should be permitted whether pursued during bankruptcy or outside of bankruptcy.

Cases in this third category should in every instance satisfy the antitrust law failing firm defense. By definition, reorganization in Chapter 11 is not possible; alternative purchasers presenting lesser competitive concerns are not available; and the firm is facing imminent insolvency.182 In the case of the American Airlines/TWA merger, the Justice Department granted early termination of the merger investigation.183

D. Why Anticompetitive Business Combinations Succeed in Bankruptcy

The prior sub-part identified three categories of bankruptcy business combinations defined by the level of antitrust concern presented. Theory suggests cases in which the substantive standards of bankruptcy and of antitrust conflict will not be rare but will arise in the normal course. It is precisely that which makes bankruptcy business combinations attractive to the constituents of the bankruptcy estate that also renders them problematic as a matter of competition policy. When a company or asset is put up for bid, its most significant competitor should be the highest bidder.

There are two reasons for that expectation. First, the most significant competitor is experienced and established in the relevant market. It has the wherewithal to use the assets efficiently. Second, that competitor stands to realize a monopoly premium from the business combination.184 The combination either creates a position of market dominance with the attendant pricing power or it solidifies a position of dominance that it already had. Of those two reasons, the first may reflect synergies from the merger and may be beneficial, although nothing suggests that the synergies between the dominant

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182 The requirements for the defense. See 2010 Guidelines section 11; supra notes XX-YY and accompanying text.
184 These same explanations exist when the failing firm defense is applied outside of bankruptcy. See supra notes XX-YY and accompanying text.
competitor and the bankrupt firm are greater than synergies that less harmful business combinations might present. The second reason – pricing power from the combination – is purely harmful.

1. Irreconcileable Goals

Bankruptcy business combinations have as one goal the maximal value of the bankruptcy estate. Antitrust has the goal of preventing harm to consumers that results from dominance. Bankruptcy law’s value maximization goal looks to effects on the investing interests in the bankrupt firm. The goal is effectuated, in part, through rapid consummation of transactions where wasting asset value is a concern. As a matter of bankruptcy policy, mergers or asset sales that produce supra-normal returns are desirable.

Antitrust looks to effects on the market other than the investor interests of the bankrupt firm. Antitrust goals depend on economic efficiency. Merger review under antitrust law is not concerned with rapid consummation of transactions, but rather with the accuracy of the agencies’ and courts’ evaluations of the net consequences of a transaction. Although neither the law nor public expressions of policy so indicate, observers understand that delay may be a deliberate strategy for merger enforcement.

2. Bankruptcy Procedures Undermine Antitrust Review

Bankruptcy relies on a system of specialized non-Article III courts charged with maximizing the value of the debtor’s assets for the benefit of the constituents of the bankruptcy estate. Bankruptcy courts are constitutionally competent also to hear matters “arising in” or “related to” those bankruptcy proceedings, although the extent of that competence is the subject of recurring dispute. Antitrust claims have been treated as within the bankruptcy court’s jurisdiction in cases including Financial News Network, although constitutional challenges to bankruptcy court jurisdiction have not been litigated in the context of review of antitrust claims. Substantial questions exist whether

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185 Under some views of the role of antitrust in economic regulation, extra-market effects also are relevant.
186 The accuracy goal of antitrust is also reflected in the standards for merger review. Courts analyze mergers under the notoriously complex Rule of Reason rather than the more efficient but blunt instrument of per se illegality or legality.
187 For example, the grant of a preliminary injunction, though it does not literally forbid a merger in perpetuity, has that practical effect because the merging parties are not willing to wait and to invest the resources in fighting the case at a permanent injunction proceeding.
188 See, e.g., Stern v. Marshall (20__).
bankruptcy courts, faced with specific incentives and limited experience, are institutionally capable of giving full attention to antitrust policy concerns.\footnote{Those favoring less antitrust enforcement applaud that result. See, e.g., Greenbaum & Meese, supra n.XX, at 37 (“The [bankruptcy] court is more likely to possess the experience necessary to appreciate fully the exigencies of the situation” and “to evaluate the antitrust issue most likely to predominate, the application of the failing firm defense.”).}

Under the Financial News Network rule, bankruptcy courts have jurisdiction to decide complex antitrust questions through a process of reference from U.S. district courts.\footnote{See 28 USC 158.} That jurisdictional authority does not necessarily mean they must decide these issues. Procedures are available for district courts to “withdraw the reference” and require the bankruptcy court to abstain from deciding an issue, sending the matter to the district court for decision. However, no consistent rule for withdrawing the reference has emerged in the courts. Academic literature does not contain a theoretical argument supporting any bright-line rule.

The Bankruptcy Code and Hart-Scott-Rodino Act contain an abbreviated pre-merger notification process, shortening by one-half to 15 days the period for initial government review of the proposed merger, and by two-thirds to 10 days the subsequent waiting period after full compliance with a government request for further information, before consummation of the merger or asset sale.\footnote{11 USC 363(b)(2). Enacted in 1976 as an amendment to the Clayton Act, the Hart-Scott-Rodino Act requires merging parties to give the federal antitrust enforcement agencies advance notice of an intended merger or asset sale that exceeds certain thresholds of economic relevance. 15 U.S.C. 18a. The Bankruptcy Code originally did not include any reference to the requirement of pre-merger notification. See Pub. L. No. 95-598, 1978 HR 8200, s. 363(b) (1978). Paragraph (b)(2) was added in 1984, including a 10-day waiting period after notification to the enforcement agencies, with no statutory waiting period after compliance with the second request. See Pub. L. No. 98-353, 1984 HR 5174, s. 442 (1984). This may be in part because Congressman Peter Rodino, one of the co-sponsors of the Hart-Scott-Rodino Act, was Chairman of the House Judiciary Committee in 1984. See http://en.wikipedia.org/wiki/Peter_W._Rodino (visited October 23, 2011). In 1994 Section 363(b)(2) was amended to include the double waiting period -- 15 days prior to second request, 10 days after substantial compliance -- that currently exists. See Pub. L. No. 93-394, 1994 HR 5116, s. 109 (1994) (referencing 15 U.S.C. s. 18a).} Those abbreviated waiting periods reflect a policy favoring quick resolution of the proceedings, to avoid the wasting of assets and to ensure the compensation of creditors. They are likely insufficient for full merger review and are insufficient to permit enforcers adequately to prepare to litigate to block the merger or asset sale. Sophisticated firms understand that the bankruptcy forum is preferable for bringing about a successful merger over government opposition.

But neither the legislative history of the Bankruptcy Code nor the academic literature justifies fore-shortened procedures in bankruptcy. Commentators favoring bankruptcy or antitrust state competing justifications for their preferred approaches. On
the one hand, bankruptcy involves a “need for speed,” supporting fore-shortened waiting periods. On the other hand, serious antitrust review takes time, supporting longer waiting periods.\footnote{See, e.g., Greenbaum & Meese, Fall 1993 Antitrust; James Spears, Spring 1992 Antitrust.}

3. Antitrust Agency Review of Business Combination Transactions Under Section 363(b)

Section 363(b) explicitly recognizes the need for federal antitrust review of mergers or asset sales beyond a certain minimum size, as has been dictated by the Hart-Scott-Rodino (HSR) Act since 1976.\footnote{15 U.S.C. 18a.} The section requires notice to the appropriate agencies for a “reportable transaction” for which notice would be required outside of bankruptcy, determined by the size of the parties or the size of the assets or securities involved in the transaction.\footnote{363(b)(2), 15 USC 18a.}

Since amendments to the section in 1994, Section 363(b) has incorporated waiting periods to allow for agency review of the proposed transaction.\footnote{Prior to 1994 there was confusion with regard to the waiting periods to be applied.} HSR waiting periods for bankruptcy sales or mergers are truncated relative to the non-bankruptcy review periods in the HSR Act. Outside of bankruptcy the initial waiting period is 30 days, followed by an additional 30 days after party compliance with a so-called second request for documents and testimony regarding the transaction.\footnote{15 USC 18a.  Parties not infrequently voluntarily agree to extend one or another of these periods if they believe they can convince the agencies not to sue to block the merger.} In an asset sale or merger conducted in bankruptcy under Section 363(b), the initial waiting period is 15 days and the period after a second request is 10 days, identical to the waiting periods for a cash tender offer.\footnote{15 USC 18a.}

The most likely explanation for the shorter waiting period in bankruptcy is concern for wasting asset value while the firm is operating under the cloud of Chapter 11 bankruptcy protection. Rapid reorganizations are believed to preserve estate value. Courts and commentators frequently refer to the necessity of speed in bankruptcy proceedings.\footnote{See, e.g., Ira L. Herman, Statutory Schizophrenia and the New Chapter 11, 2 Am. Bankr. Inst. J. 30, 30 (2007) (discussing the “second policy imperative” of Chapter 11 bankruptcy as being “the need for speed”); Jay Lawrence Westbrook, The Commission’s Recommendations Concerning the Treatment of Bankruptcy Contracts, 5 American Bankruptcy Institute L. Rev. 463, 474 n.84 (1997) (citing the American Bankruptcy...} Congress too has recognized, without explanation, the value of speed in...
bankruptcy reorganizations. Arguments that time is of the essence are not frequently supported with empirical evidence. While anecdotal examples exist in the case-law, contrary anecdotes may also be found.

The policy of encouraging speed at all costs serves the interests of the constituents of the bankruptcy estate, who will realize any benefit from preserving asset value while bearing a small share (if any) of the harm from an anticompetitive business combination transaction.

4. Short Review Periods Undermine Merger Challenges and Present Forum-Shopping Concerns

Short agency review periods for reportable business combination transactions under 363(b) might also be justified on the basis of a preference for those transactions’ consummation in spite of antitrust concerns. Waiting periods permit the antitrust enforcement agencies to reach judgments about the relative costs and benefits of a proposed transaction through discovery-like processes including issuing subpoenas for documents, interviewing third-party witnesses, taking depositions of party witnesses, and hiring and preparing economic and industry experts.

At the end of the waiting periods, the agencies must sue to enjoin the transaction or risk its prompt consummation. Where consummation occurs, unwinding a merger or substantial asset sale can be difficult or impossible. Remediying transactions post-

Review Commission Report at 451 (1997)); In re Lewis, 147 B.R. 37, __ (Bankr. W.D. Mo. 1992) (citing United Savings Ass’n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365 (1998), for the proposition that “it was the duty of the Bankruptcy Court to speed proceedings and to monitor reorganization cases very closely” in service of the goal of preserving shareholder value); In re Ionosphere Clubs, Inc., 105 B.R. 765, __ (Bankr. S.D.N.Y. 1989) (refusing to permit an arbitration proceeding to continue during the Eastern Airlines bankruptcy, noting that “allowing the arbitration to proceed would usurp the bankruptcy court’s critical role in the reorganization proceedings, affect special bankruptcy interests, and thwart the goal of judicial speed and economy which is particularly necessary for the rehabilitation of this Debtor.”), reversed on other grounds, 922 F.2d 984 (2d Cir. 1990); In re Southwest Oil Co., 84 B.R. 448, 453 (Bankr. W.D. Tex. 1987) (“Speed is the thrust of the 1978 Reform Act, as it pertains to reorganization under Chapter 11.”).


See Jacoby & Janger, Ice-Cube Bonds, 123 Yale L.J. 862.

Speed may frustrate rather than advance estate value maximization goals. For example, asset values may be best realized after careful preparation and sale procedures. Mitchell (Bankr. D. Tex.). Professor Westbrook has noted, “[p]art of the essence of reorganization bankruptcy--heresy though it may be to say it--is delay, within reason.” Delay serves the quintessentially bankruptcy goals of permitting the debtor “breathing room” to reorganize. Westbrook, 5 ABI L. Rev. at 474.

See Merger Review Process, supra.
confirmation regularly is likened to “unscrambling the egg.”

On the flip side of the coin, a transaction that is blocked even preliminarily frequently fails to proceed. The expectation of a permanent injunction after a preliminary injunction has issued is sufficiently great to cause deals to unwind.

Requiring agency counsel to litigate over a transaction with less than the 60-day review period is likely to undermine their ability successfully to enjoin anticompetitive transactions. As one example, expert testimony may be difficult to impossible to prepare in the 25 days permitted by the fore-shortened review periods for bankruptcy mergers or asset sales. Careful consideration of theories of antitrust liability is difficult to accomplish even with full waiting periods, to say nothing of the abbreviated periods provided for 363(b) sales.

In contrast, the merging parties have advance knowledge of both their planned transaction and the likely agency response, so are not prejudiced by the short preparation time. One example is Sungard Data Systems’ purchase of Comdisco Inc. in a section 363(b) sale conducted as part of Comdisco’s bankruptcy proceedings. Counsel to Sungard published an article regarding the sale after the U.S. District Court denied the sought injunction. Counsel noted that, having anticipated the Antitrust Division’s requests for documents and information, the merging parties were able to respond to those requests immediately on receiving them, limiting the Antitrust Division to the statutory 25 days. That strategy seems likely to have undermined the Division’s ability effectively to litigate against the transaction, which involved a sophisticated and difficult to establish theory of the relevant antitrust market. Counsel’s retrospective article on the Sungard/Comdisco business combination suggests that forum-shopping by first filing bankruptcy may have been the parties’ explicit intent.

5. 363(b) Transactions Undermine Antitrust Goals In Other Ways

Nothing about section 363(b) ensures that antitrust concerns relating to a business combination transaction pursued under that section are respected. Bankruptcy courts have broad authority to allow or to deny the proposed sale of assets. That authority is highlighted in section 105(a) of the Bankruptcy Code, which permits courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of

\[\text{\textsuperscript{204}} \text{FTC v. University Health Inc., 938 F.2d 1206, 1217 n.23 (11th Cir. 1991).} \]

\[\text{\textsuperscript{205}} \text{Steve Axinn, Antitrust Source (2002).} \]

\[\text{\textsuperscript{206}} \text{One might argue that the existence of longer review periods outside of bankruptcy increase the likelihood that an agency forced to litigate on a fore-shortened clock will be unsuccessful. Agency counsel may be accustomed to a pace of preparation that is inconsistent with operating under bankruptcy court supervision. Courts may be accustomed to receiving presentations of evidence that are much more robust than is possible on a shorter clock. It is possible that neither counsel nor courts are sufficiently flexible to adjust to the alternative procedures.} \]

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this title.\textsuperscript{207} Bankruptcy courts cite the section 105(a) power to supplement section 363(b) when approving business combinations.\textsuperscript{208}

Nothing in section 363(b) or elsewhere in the Bankruptcy Code prescribes standards cabining the bankruptcy court’s decision. Caselaw limits discretion to ensure business combinations serve the goals of maximizing estate value and increasing the likelihood of success in reorganization.\textsuperscript{209} Bankruptcy courts do not seek to accomplish other social policy goals when evaluating requests to sell assets or firms under section 363(b).\textsuperscript{210}

The section 363(b) asset sale process does a poor job of accommodating antitrust concerns. Even if they faced appropriate incentives to do so, bankruptcy courts do not enjoy discretion to give weight to the objections of antitrust enforcement agencies or private antitrust plaintiffs when reviewing mergers or asset sales conducted under section 363(b) during the pendency of the bankruptcy proceeding.

A variety of more specific concerns with asset sales under Section 363(b) exist. There is no reporting process for mergers or asset sales that do not meet the HSR threshold, threatening the possibility that those sales occur without antitrust review.\textsuperscript{211} There is no express requirement that non-stakeholders in the bankruptcy proceeding may appear to challenge the merger or sale.\textsuperscript{212} Merger challenges that go to trial outside of bankruptcy may be tried to a jury, while claims tried before a bankruptcy court do not include a jury right.\textsuperscript{213}

6. Bankruptcy Courts Make Poor Antitrust Judges

\textsuperscript{207} 11 USC 105(a).
\textsuperscript{208} See, e.g., \textit{In re AMR Corp., et al.}, No. 11-15463, 2013 WL 2643174 (June 10, 2013) (Opinon para. D.)
\textsuperscript{209} See \textit{In re ASARCO LLC}, 650 F.3d 593, 601 (5th Cir. 2011) (sale should comport with an “articulated business justification for using, selling, or leasing the property outside the ordinary course of business”); \textit{In re Continental Airlines Inc.}, 780 F.2d 1223, 1226 (5th Cir. 1986) (same); \textit{In re Advanced Packaging & Prods. Co.}, 426 B.R. 806, 816 (C.D. Cal. 2010) (abuse of discretion standard of review); \textit{In re Lionel Corp.}, 722 F.2d 1063, 1071 (2d Cir. 1983) (business judgment rule).
\textsuperscript{211} This concern is not specific to bankruptcy proceedings, but it is possible that the circumstances of bankruptcy, including rapid reorganizations, may exacerbate the effect of non-reporting by undermining the abilities of the agencies or would-be complainants to learn of and act on the proposed merger or sale.
\textsuperscript{212} As a practical matter, bankruptcy courts appear willing to hear challenges brought by the enforcement agencies.
\textsuperscript{213} This concern arises if private plaintiffs rather than federal agencies bring the merger challenge. Federal merger challenges either occur before the Federal Trade Commission or in district court; in the latter case a jury is highly unlikely.
Bankruptcy judges are institutionally ill-suited to render decisions on merger matters, which represent one of the most complex and policy-laden areas of antitrust review. First, bankruptcy judges can be expected to be unschooled in antitrust decision-making relative to generalist district court judges. Second, bankruptcy judges are trained to think in terms of protecting investor interests in bankrupt firms to the exclusion of non-investor interest including consumers and society at large. Third, appellate review of bankruptcy court decisions is frequently less robust than appellate review of decisions by trial courts in other litigation settings. Finally, evaluation of bankruptcy judges, who are not life-tenured, turns on their success deciding bankruptcy issues.

These realities regarding the institutional competence of bankruptcy courts to hear antitrust matters explain the apparent, but unstated, reluctance of the antitrust enforcement agencies to bring merger challenges before bankruptcy courts. In cases discussed in the following Sections, both the Federal Trade Commission and the Antitrust Division have endeavored, with differing degrees of success, to ensure their anti-merger arguments were heard by district courts rather than by bankruptcy courts. Section 6 below discusses a similar effort by private plaintiffs bringing an antitrust challenge in the context of a bankruptcy proceeding, an effort that involved a violation of the automatic stay in bankruptcy and attendant sanctions.

III. OPTIMAL RECONCILIATION

The prior Part identified deep and enduring conflicts between antitrust merger control and bankruptcy business reorganizations. Differences in goals between business bankruptcies and competition policy suggest that conflicts will arise whenever there is a substantial bankruptcy in a concentrated industry. Those have been frequent in recent decades, and the representative cases in the prior sub-Part show that conflicts do arise. This Part is the first effort to identify which policy should prevail in seeking the optimal legal and regulatory approach to mergers in declining industries.

A. A Clash Between Groups of Diffuse Claimants

Both bankruptcy and antitrust can be understood as seeking to mitigate disparities in bargaining power that emerge when constituents are unable to protect their own interests in bilateral bargaining with the firm. Upstream investor interests include employees, communities, creditors, and equity investors (suppliers of labor, geography, capital, and entrepreneurship) and are diffuse relative to the bankrupt firm. That relative diffusion undermines those investors’ bargaining power vis-a-vis the firm: a large

\[\text{\textsuperscript{214} Efforts to study agency decision-making in this regard have been unsuccessful due to agency assertions of privilege from FOIA disclosure of documents or information reflecting decision-making processes.}\]

\[\text{\textsuperscript{215} 11 USC 362(a).}\]
percentage of the individual investors lack the ability to dictate terms or to demand timely compensation. The opposite problem arises when the bankrupt firm’s relationship with consumers is considered. Like investors, consumers are too diffuse to protect their individual interests in bargaining with the bankrupt firm.

It is less obvious that the interests of the diffuse investors are opposed to the interests of the diffuse consumers. The Chapter 11 reorganization, including the asset sale or merger conducted as part of it, can be seen as sharing economic value from the market in which the firm operates between upstream claimants (investors) and downstream claimants (consumers). The consumers benefit if the asset or firm is diminished, improving their bargaining position in relation to it. The investors benefit if the asset for firm is enhanced, increasing the value to be distributed among them. If the economy is static, the situation is zero-sum: a benefit realized by either class of claimants is offset by a loss suffered by the other class of claimants.

The zero-sum nature of this tug-of-war between consumers and investors operating in the market in which the assets or firm operate(s) explains why the conflict between bankruptcy law’s estate value maximization goal and antitrust law’s consumer protection goal is irreconcilable. This refined understanding also enables steps toward an optimal balance between the competing policy goals.

B. Diffuse Claimants Lacking Ex Ante Bargaining Opportunity Must Prevail

In the tradition of law-and-economics that dominates both antitrust and business bankruptcy scholarship and policy-making, this paper asserts that economic efficiency is a guiding principle in analyzing both antitrust law and bankruptcy law.216 Bargaining disparity produces market failures leading to inefficient resource allocations. Regulatory intervention can be appropriate to correct for such market failure.217

One approach to resolving the conflict between antitrust and bankruptcy is to evaluate which set of claimants is more diffuse and therefore in greater need of legal intervention to mitigate the market failure caused by bargaining disparity. In the ordinary circumstance the more diffuse set of claimants will be consumers. Investors frequently band together in the form of labor unions and pooled capital investment schemes such as mutual funds. Creditors are themselves sophisticated and capital-intensive enterprises.


In contrast, consumers typically bargain individually, competing against one another for scarce opportunities to contract with suppliers in the industry. Economic theories of collective action demonstrate consumers are unlikely to interact collectively to protect their collective best interests. The antitrust enterprise exists to protect those interests, which the bargaining process frequently undermines.

Stakeholders in bankruptcy proceedings, including creditors, equity investors, and employees of the bankrupt firm, have the further advantage of an opportunity to bargain \textit{ex ante} to protect their interests in the context of bankruptcy. Stakeholders have the ability to assess the risk of contracting with the debtor firm before its filing and to adjust contract terms on the basis of those risks. For example, creditors may take security interests, gaining the protections of security including first right to recovery from the debtor’s assets.\textsuperscript{218} Other creditors adjust the terms of their credit relationship, including interest charges or repayment schedules, based on risk assessments. Equity holders adjust the prices they pay for ownership of the debtor’s equity shares to reflect concerns for loss in bankruptcy. Finally, even employees, the least well-protected of the stakeholders, have some ability to recover wages due\textsuperscript{219} and to bargain for payment terms in light of expectations regarding the firm’s failure.

In contrast, in the ordinary course consumers do not form advance contract relationships that give them stakeholder status in bankruptcy proceedings. Exceptions to this general reality include long-term contracts that place a consumer in the position of a creditor\textsuperscript{220} and down payments on consumer goods that have the same effect.\textsuperscript{221} In the ordinary course, consumers are pure non-stakeholders who rely on the preservation of efficiency in the industry but have little to no ability to enforce that goal through their own action.

\textbf{C. Ties Should Break in Favor of Merger Enforcement Policy}

The totality of considerations favors antitrust law’s merger policy goals over bankruptcy’s value maximization goals. Even where equally diffuse, the localized constituents of the bankruptcy estate are better positioned than are the consumers to protect their interests. Shareholders and creditors both are in contract relationships with the bankrupt firm. Those contracts are subject to negotiation. The interests of the shareholder and creditor counter-parties can be protected through negotiation.

\textsuperscript{218} 11 U.S.C. 506(a), (b); 725.
\textsuperscript{219} 11 U.S.C. 507(a)(4).
\textsuperscript{220} 11 U.S.C. 365.
\textsuperscript{221} See 11 U.S.C. 507(a)(7).
For these reasons, we are willing, outside of bankruptcy, to prefer consumer interests to shareholder and creditor interests. We will subject firms and, derivatively, their owners and creditors to financial penalties for anticompetitive conduct, including illegal mergers. The only difference between the non-bankruptcy circumstance and the circumstance inside of bankruptcy is the timing. Analogizing to the principle of *Butner v. United States*, equity holders and creditors should not be better off in bankruptcy than they were out of bankruptcy.

### IV. Proposals for Reform

The prior Part explained the optimal reconciliation of the conflict between antitrust merger review and bankruptcy business reorganizations as one that favors the goals of antitrust. Reform is necessary to bring about that reconciliation. In this Part the paper offers paths to reform to correct for a *status quo* that suffers from a tendency toward false negatives in the application of antitrust policy to business combinations conducted under the supervision of a bankruptcy court. Possible approaches include amendments to the Bankruptcy Code as well as changes to interpretations of the Code in its current form.

#### A. Reorganization Plans Better Protect Antitrust Review of Bankruptcy Business Combinations

Moving to greater use of plan sales versus section 363(b) sales for bankruptcy business combinations is the most direct and obvious route to mitigating the tension between the policies of bankruptcy law and those of antitrust. The feasibility test for plan approval under Section 1129 promises the best check on use of the bankruptcy forum to effect business combinations that violate the Clayton Act. Merger review procedures under that section allow for full review, conducted under the normal 30-plus-30 day waiting period mandated in the HSR Act.

The incentives facing bankruptcy courts at the plan confirmation stage are different than the incentives at the time of an out-of-the-ordinary-course-of-business asset sale or merger conducted under Section 363(b). Instead of seeking to maximize asset value to enable a reorganization to occur, the plan confirmation process seeks to ensure that a business structure is in place that will permit a firm to continue to be successful after confirmation. The legality of a business combination conducted as part of a plan

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223 See supra notes XX-YY and accompanying text.
224 See supra notes XX-YY and accompanying text.
of reorganization is inextricably linked to the feasibility of the reorganization.\textsuperscript{225} Stakeholders in the bankruptcy proceeding have incentive and opportunity to bring problematic proposals for business combinations to the attention of the antitrust enforcement agencies, mitigating problems of nonreportable transactions evading antitrust review.\textsuperscript{226}

Unlike in the context of section 363(b) sales, which Professor LoPucki convincingly argues are part of a race-to-the-bottom competition among bankruptcy courts, courts do not stand to benefit by confirming plans that immediately fail due to antitrust challenges to business combinations.\textsuperscript{227} The reputational penalty to a court associated with plan failure caused by a court’s enjoining the transaction would be greater than in the context of failures that occur over a longer time horizon. Such a failure-by-injunction would be immediate and readily traceable to a failing in the plan confirmation process.\textsuperscript{228}

Legislative change might give effect to what is generally agreed to be the real thrust of section 363(b) – sales of assets, not entire businesses – with the effect of shifting business combinations to the plan confirmation stage of proceedings. Such an amendment might include as part of paragraph (b)(1): “Any sale of all or substantially all of the property of the estate may be conducted under this section only if the court determines after notice and a hearing that confirmation of a plan under this Chapter is highly unlikely to succeed.”\textsuperscript{229} The hypothetical amendment preserves the 363(b) sale option for emergency cases but narrows the current “business rationale” requirement, through which most such sales are justified. The likely success of the hypothetical amendment, even if enacted, is subject to question: Jacoby and Janger argue that the “melting ice cube” argument for 363(b) sales has been accepted as a matter of course, suggesting that courts might simply begin to conclude that plans can never succeed.\textsuperscript{230}

\textbf{B. Withdrawing the Reference for Antitrust Merger Challenges}

One resolution to the concern that expertise and institutional incentives favor value maximization over antitrust goals would be to challenge the results of Section 363(b) asset sales in district court, relying on the bankruptcy court to hold off on its

\begin{footnotesize}
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\textsuperscript{225} See supra notes XX-YY and accompanying text.
\textsuperscript{226} See supra notes XX-YY and accompanying text.
\textsuperscript{227} Contrast LoPucki, supra n.XX, at 137-140, 167-180 (arguing that section 363(b) business combinations are an indication of corrupted reorganization proceedings).
\textsuperscript{228} Contrast LoPucki, supra n.XX, at 97-122 (plan failure a regular feature of modern large public company reorganizations; fact of high failure rates not ascribed to bankruptcy courts’ failures).
\textsuperscript{229} The language draws on the “plan sale” paragraph, Code section 1123(b)(4).
\textsuperscript{230} Jacoby & Janger, supra n.XX, at YY.
\end{footnotesize}
decision approving the sale until the district court decides the antitrust claim. Withdrawal of the reference with regard to antitrust review of assets sales would be an elegant mechanism resolving the tension between the bankruptcy court’s estate-value-maximization goals and competition policy concerns raised by the asset sale.

The Judiciary Code provides:

(d) . . . The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.231

In operation, the mandatory withdrawal approach would involve a challenger to a bankruptcy asset sale appearing in bankruptcy court, raising that challenge, and moving the district court to withdraw the reference to decide the antitrust issue.232 Bringing this approach into the mainstream would involve either common-law interpretations of section 157(d) that require withdrawal when a Clayton Act challenge is brought to a bankruptcy business combination or changes to the bankruptcy reference procedure imposed by district court rule.

1. Mandatory Withdrawal in Operation

Petitioning the district court to “withdraw the reference” is a means to move proceedings from the bankruptcy court, where they may be heard only by reference from an Article III judge, to a federal trial court. Such a move has two clear benefits. First, federal district courts are generalist courts, frequently with some experience in antitrust matters, while bankruptcy courts are specialized tribunals whose judicial work is focused entirely on federal bankruptcy law. At least one commentator has noted that bankruptcy judges may be myopic with regard to non-bankruptcy matters.233 Second, bankruptcy proceedings are directed entirely to maximizing estate value and not to the broader economic impacts of the proceedings as those economic impacts affect entities that are not constituents of the estate.

232 As a formal matter, withdrawal of the reference could occur in one of two ways. First, proceedings that are considered “non-core” are required to be reviewed de novo by the referring district court on the timely objection of any party. 28 U.S.C. 157(c)(1). A determination that an antitrust challenge to a bankruptcy asset sale is non-core would change the fact-finder to a tribunal less likely to be pre-disposed to allow the transaction. Second, even when a proceeding is core, an interested party may seek to have the district court exercise its discretion to withdraw the reference “for cause shown.” 28 USC 157(d). Withdrawal occurs by motion made to the district court. Fed. R. Bankr. P. 5011.
233 Zywicki.
Under the broadest interpretation of section 157(d), the mere necessity of resolving an antitrust challenge would be a basis for mandatory withdrawal. This approach reads the word “consideration” to mean what it says – if the court must “consider” antitrust law, withdrawal is required. This approach has been pejoratively called the “literal theory.” Most courts have refused to read the word “consideration” so broadly for fear of “creat[ing] an ‘escape hatch’” that “would eviscerate much of the work of the bankruptcy courts.” The prevailing interpretation of 157(d) reads “consideration” to mean “material and substantial consideration,” suggesting both that the consideration of antitrust (or other federal) law must be material to the outcome and that the amount of consideration is significant.

Several courts have held the standard to be met in the presence of antitrust claims. In *Lifemark Hospitals v. Liljeberg Enterprises*, claims that contracts involving the debtor were illegal tying arrangements presented a basis for mandatory withdrawal when the claims did not present *per se* violations of the antitrust laws. Instead, the court must decide, “among other things, definition of the relevant product and geographic market area, and determinations of whether competition was unreasonably restrained by a tying or exclusive dealing agreement, whether a particular hospital lease constituted a tying product, and whether debtor’s conduct constituted an unfair trade practice.” This was “more than ‘rote application’ of established antitrust law.” In *In re National Gypsum Co.*, patent claims with antitrust counterclaims “necessarily entailed material and substantial consideration of non-Code federal law,” and in *Burger King Corp. v. B-K of Kansas*, a creditor’s trademark claims and the debtor’s antitrust and RICO counterclaims met the standard. And in *Michigan Milk Producers Ass’n v. Hunter*, antitrust counterclaims presented a basis for mandatory withdrawal because they required “substantial and material consideration of federal antitrust claims.” The counterclaim

236 *See* 1 Colliers on Bankruptcy para. 3.04, at 3-57 (citing cases).
in question “alleged that a supply agreement entered into between [creditor] and [debtor] was in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.”

2. Narrowing Interpretations of 157(d)

Although several examples exist of antitrust issues that satisfy the prevailing section 157(d) standard for mandatory withdrawal, there are limits to relying on this approach. First, none of the successful arguments arise in the merger context. Second, courts paying close heed to narrowing interpretations of 157(d) have often reached the opposite conclusion on antitrust claims. Third, the most extreme narrowing interpretation of section 157(d), advanced by a small minority of courts and a leading bankruptcy treatise, would almost certainly prove insurmountable in the context of any merger challenge to a bankruptcy business combination.

a. Interpretation, not Application

One commonly accepted narrowing interpretation of the mandatory withdrawal provision speaks to the degree of “interpretation” of the non-bankruptcy that is required. The Seventh Circuit in Matter of Vicars Insurance Agency distinguished between “mere application” and “interpretation,” outlining three approaches from the “least restrictive end of the spectrum” to the “most restrictive interpretations” of 157(d). The Matter of Vicars Insurance Agency court preferred the middle approach: “mere presence of a non-title 11 issue, even if that issue is outcome determinative,” is not sufficient to invoke mandatory withdrawal (although permissive withdrawal remains available), but neither is it essential that “non-title 11 issues ‘dominate[]’ bankruptcy issues.” Instead, “consideration of both title 11 and other laws of the United States” involves a court’s “undertak[ing] analysis of significant and unresolved issues regarding the non-title 11 law” as distinct from “mere application of existing law to new facts.”

Courts have held that the elements of mandatory withdrawal are not met when antitrust claims other than merger issues are raised in bankruptcy, although only rarely in

242 Id. at 214.
cases in which the antitrust issues were squarely presented and fully articulated. In *Hawaiian Airlines, Inc. v. Mesa Air Group, Inc.*, the antitrust issues were raised in counterclaims, where the original claims were within the bankruptcy court’s jurisdiction as core proceedings. Noting both that “the antitrust and other federal law issues in this case appear to be straightforward and not matters of first impression” and that “Mesa has not identified those portions of the antitrust laws which it contends will require substantial and material consideration,” the *Hawaiian Airlines* court concluded mandatory withdrawal was not required.

There is only one example of a mandatory withdrawal motion being addressed in the context of a merger challenge to a bankruptcy business combination. Both the Commonwealth of Pennsylvania and the State of Illinois, continuing their litigation to enforce the Sherman Act after the Federal Trade Commission abandoned its challenge to the CNBC/FNN transaction, moved the district court to withdraw the reference. Noting circuit precedent that suggested withdrawal might be mandatory if the matter involved “significant interpretation of CERCLA,” the district court held that a merger challenge was a “mere application of established antitrust principles to new facts.”

Such a narrow interpretation of section 157(d) undermines a policy of mandatory withdrawal whenever antitrust merger issues are presented in the context of a bankruptcy business combination. Enacted in 1950, the Clayton Act has existed in substantially its current form for more than six decades. Since 1968, increasingly sophisticated versions of the *Guidelines* have been considered, promulgated, and generally accepted. Most mergers brought to the antitrust enforcement agencies for review are permitted to proceed

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247 *Id.* at 223. *Hawaiian Airlines* can thus be explained as a failure to fulfill a burden of proof. *See also In re Hvide Marine Inc.*, 248 B.R. 841, 843 (M.D. Fla. 2000) (no mandatory withdrawal for oblique reference to “unlawful monopolistic activities in violation of the Sherman Antitrust Act” and other federal law).

Other cases refusing mandatory withdrawal in the presence of antitrust issues do not involve meaningful assertions of antitrust issues to be decided. The district court in *In re Mathson Industries* held that a claim of collusion affecting the outcome of a section 363(b) asset sale, while couched as antitrust issue (bid-rigging), was actually a claim about the application of Bankruptcy Code section 363(n), which imports the bid-rigging standard into the bankruptcy code as a reason to set aside a bankruptcy sale. *In re Mathson Indus., Inc.*, 408 B.R. 888, 891 (E.D. Mich. 2009). It was irrelevant that “the existence of a Sherman Act violation would help Plaintiff prove her claim.” *Id.* In an analogous case, assertion of state-law antitrust claims that would be decided by reference to analogous federal law did not provide a basis for mandatory withdrawal, because the federal law was not binding. *Kiep v. Turner*, 80 B.R. 521, 524 (D. Hawaii 1987).

249 *Id.* at 4-5 (citing *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991) (withdrawal may be mandatory if interpretation of CERCLA is required)).
without challenge and even minimal investigation using the early termination procedure. The core challenge in merger litigation is the application of complex facts to well-established legal principles. A party seeking to have a matter removed to the district court would be hard-pressed to argue that the merger challenge meets the *Matter of Vicars Insurance Agency* standard for mandatory withdrawal.

b. “Only One Law”

One pair of commentators opposed mandatory withdrawal for questions of merger enforcement arising in reorganization cases under a more extreme narrowing interpretation of the mandatory withdrawal standard. These opponents of mandatory withdrawal base their arguments on interpretations of Judiciary Code section 157(d), requiring withdrawal “on timely motion of a party . . . if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States.” They argue that the only law being interpreted is the Clayton Act because section 363(b) is not subject to different interpretations. A small minority of lower courts follows this “only one law” approach.

That interpretation of section 157(d) is wrong-headed. Every bankruptcy court decision approving a business combination (whether as part of a plan or under 363(b)) necessarily interprets the bankruptcy code. If antitrust questions are also present, the “both title 11 and other laws of the United States” language of section 157(d) is satisfied. The “only one law” argument also ignores the justification for making and

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250 See Greenbaum & Meese, *supra* n.XX, at 37. See also XXXX, ed., 1 Collier on Bankruptcy para. 3.04, at 3-55 (XXXX) (“probably the correct way [to read section 157(d)] is that the district court is not required to withdraw” a proceeding only presenting an antitrust issue).


253 *Cf. Burger King Corp. v. B-K of Kansas, Inc.*, 64 B.R. 728, 731 (D. Kan. 1986) (resolution of relief requires application of bankruptcy law, not requiring any showing of interpretive difficulties surrounding the bankruptcy issues).

254 See Nancy C. Dreher et al., *Bankruptcy Reference Manual* § 2.11 (Norton, 5th ed. 20XX) (most courts hold that the interpretation be of the non-bankruptcy scheme).

A leading treatise advances the most extreme possible interpretation of section 157(d). Colliers on Bankruptcy hews literally to the statutory text to suggest both bankruptcy and non-bankruptcy issues must be present for mandatory withdrawal, in keeping with the small minority of cases and commentators like Greenbaum and Meese. *See* 1 Colliers on Bankruptcy para. 3.04, at 3-55 to 3-57; *compare supra* notes XX and XX. The same treatise then advances the view, in deviation from the statutory text, that the involvement in the non-bankruptcy law must extend beyond mere “consideration” (the statutory term) to “substantial and material consideration.” 1 Colliers on Bankruptcy para. 3.04, at 3-56 to 3-57 & n.19
withdrawing the reference. Because the reference to bankruptcy courts is justified by their unique expertise in bankruptcy matters, the reference should be withdrawn when matters outside that unique expertise are presented for decision.\textsuperscript{255} Those non-bankruptcy matters are better handled by generalist district court judges who, with generalized experience and the security of life tenure, are better equipped to handle non-bankruptcy issues.\textsuperscript{256}

1. Overcoming the Narrowing Interpretations

The distinction between successful arguments for mandatory withdrawal and those that are unsuccessful turns primarily on movants’ ability to demonstrate a need for “interpreting, not applying” or “material and substantial consideration of” antitrust law. Most unsuccessful motions raising antitrust issues appear to fail based on their oblique references to antitrust claims or counter-claims, without a meaningful demonstration of the complexity of those claims. In contrast, successful motions show the interpretive challenges inherent in deciding the antitrust issue. For example, the assertion of a tying challenge in \textit{Lifemark Hospitals} succeeded in producing withdrawal to the district court when the movant described the difficult issues of market definition, reasonableness of the restraint, and the existence of a tying product.\textsuperscript{257} In contrast, the unsuccessful motion in \textit{Hawaiian Airlines} involved antitrust counterclaims but no demonstration what “portions of the antitrust laws” were implicated.\textsuperscript{258}

A full description of the process for deciding a complex merger issue should satisfy the need to tailor the withdrawal motion to that in \textit{Hawaiian Airlines}. To an extent even greater that tying claims, full consideration of a merger challenge involves market definition, calculation of market shares and changes in market shares, consideration of the competitive effects of the business combination, consideration of possible efficiencies that might emerge and a determination whether those efficiencies

\textsuperscript{255} See \textit{Franklin Savings Ass’n v. Office of Thrift Supervision}, 150 B.R. 976, 980 (D. Kan. 1993) (minority approach would incongruously leave matters involving only non-bankruptcy issues in bankruptcy court, while matters involving partly bankruptcy issues would be withdrawn).

\textsuperscript{256} See \textit{In re St. Mary Hosp.}, 115 B.R. 495, 497 (E.D. Pa. 1990); \textit{In re Johns-Manville Corp.}, 63 B.R. 600, 602 (S.D.N.Y. 1986); \textit{In re American Freight Sys., Inc.}, 150 B.R. 790, 794 (D. Kan. 1993). \textit{See also} 1 Collier on Bankruptcy Para. 3.04, at 3-55 (district courts better equipped than bankruptcy courts to determine non-bankruptcy federal issues). “Possibly Congress was wary of the possibility that a bankruptcy judge would favor the Code provision that conflicted with a provision contained in another federal statute and wanted district judges to have the last word on where the case would be tried.” \textit{Id.}

\textsuperscript{257} See \textit{supra} notes XX-XX and accompanying text.

\textsuperscript{258} See \textit{supra} notes XX-XX and accompanying text.
are specific to the proposed business combination, and consideration of the failing firm defense. The merger challenge ultimately turns on the net effect on competition from the business combination – whether the competitive effects are overborne by, or overbear, the asserted efficiencies and the failing firm defense. A well-drawn motion describing the process, including ample reference to the Guidelines, with a preliminary demonstration that the proposed business combination presents facial concerns for unresolved competitive effects, easily meets the standard.

To the extent that courts hew to the excessively narrow interpretations of section 157(d), either (1) requiring difficult interpretations of both the bankruptcy code and the antitrust laws or (2) understanding merger review to be mere application of facts to settled law, those approaches will require change, whether by common law, court rule, or legislation. The common-law approach is the most promising. The interpretation of section 157(d) followed by the majority of courts should, in the presence of well-made motions, require antitrust challenges to bankruptcy business combinations to be decided by district courts.

C. Dismissals of Bankruptcy Petitions for Bad Faith

Bankruptcy courts have the power on request and after holding a hearing to dismiss Chapter 11 bankruptcy petitions “for cause” under Bankruptcy Code section 1112.259 “Cause” includes abuse of the bankruptcy process, which has been found in cases in which a financially healthy debtor sought bankruptcy to avoid antitrust liability. In SGL Carbon Corp., the bankruptcy court concluded a desire to avoid antitrust liability in a suit alleging price fixing was not a “valid reorganizational purpose” and upheld the bankruptcy court’s dismissal of the Chapter 11 petition.260 Bad faith dismissals operate to screen out bankruptcy petitions that are not consistent with the policies underlying bankruptcy law.

An analogous screen exists at the plan confirmation stage, where bankruptcy courts are charged by Code section 1129(a) to confirm only those plans “proposed in good faith.”261 Good faith is a poorly defined phrase “generally interpreted to mean that there exists a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.”262 Good faith for purposes of confirmation exists where “there is a reasonable likelihood of reorganizing the debtor”

260 200 F.3d 154 (3d Cir. 1999).
262 In re Madison Hotel Assocs., 749 F.2d 410, 425 (7th Cir. 1984) (quoting In re Nite Lite Inns, 17 B.R. 367, 370 (S.D. Cal. 1982)).
even if the plan is not the best possible approach to satisfying creditor claims.\textsuperscript{263} A more stringent phrasing of the good faith requirement for plan confirmation requires “an arguable relation . . . between the chapter 11 plan and the reorganization-related purposes that the chapter was designed to serve.”\textsuperscript{264}

The uses of “good faith” in sections 1112 (as a judicial gloss on “cause”) and 1129, while fundamentally disparate as a procedural matter, are unsurprisingly intertwined.\textsuperscript{265} Some version of a good faith requirement has existed in bankruptcy legislation at least since the 1898 Bankruptcy Act.\textsuperscript{266} Interpretations of historical good faith requirements for plan confirmation operated to prevent the debtor from using bankruptcy “to accomplish an iniquitous or unfair result” or “to obtain a result contrary to the spirit of the statute.”\textsuperscript{267}

Existing interpretations of “cause” and “good faith” requirements in Chapter 11 give little support to an argument that pursuing bankruptcy to facilitate a business combination either is a bad faith basis for filing or represents a bad faith plan proposal. The bankruptcy code has not been interpreted and applied to accommodate non-stakeholder interests or external regulatory concerns like antitrust law. Common law or legislative change would be required to accomplish this result.

Legislative change might involve one or both of two Code amendments. First, the definition of “cause” in Code section 1112(b)(4) might be amended to include “violation of controlling federal or state regulatory requirements.”\textsuperscript{268} Second, the good faith requirement for confirmation in section 1129(a)(3) might be amended to include “or in violation of controlling federal or state regulatory requirements.”\textsuperscript{269} The first is the most

\textsuperscript{263} \textit{Nite Lite Inns}, 17 B.R. at 370-71. In other words, good faith arguments should not provide a basis for advancing one proposed plan over another.

\textsuperscript{264} \textit{In re Coastal Cable T.V., Inc.}, 709 F.2d 762, 764 (1st Cir. 1983).

\textsuperscript{265} \textit{See In re Victory Const. Co., Inc.}, 9 B.R. 549, 551 (Bankr. C.D. Cal. 1981) (“As the cases disclose, however, judicial analysis of the meaning, scope, and dimension of ‘good faith’ in rehabilitation or reorganization cases has not differentiated between the ‘good faith’ required to confirm a plan of arrangement, and the ‘good faith’ required at the outset as a condition of the right to file and maintain the proceeding.”), \textit{vacated as moot, Hadley v. Victory Constr. Co.}, 37 B.R. 222 (9th Cir. BAP 1984).

\textsuperscript{266} \textit{See Victory Const. Co.}, 9 B.R. at 551-56 (tracing the history of good faith requirements in bankruptcy legislation).

\textsuperscript{267} \textit{Id.} at 555-56 (interpreting the Bankruptcy Act of 1898, Section 12). The court discussed other interpretations that spoke to concerns for hiding or wasting estate assets. \textit{Id.}

\textsuperscript{268} Such an amendment would be consistent with the exception to the automatic stay for “enforce[ment of a] governmental unit’s . . . police and regulatory power.” 11 U.S.C. 362(b)(4).

\textsuperscript{269} \textit{See} 11 U.S.C. 1129(a)(3). This addition might fairly be considered redundant to the existing language “not by any means forbidden by law,” although the existing language has not been held to encompass concerns for external regulation.
promising change to achieve the goals of ensuring the bankruptcy process is not abused to achieve business combinations that the antitrust laws would forbid. Plan sales present substantially lesser concerns for undermining the antitrust merger review process. Section 1112 is the appropriate section to control abusive business combinations under section 363(b).

Amending section 1112 to mitigate the use of bankruptcy filings solely to achieve anticompetitive business combinations is both an underinclusive and an overinclusive remedy. “Cause” would still only be found if the business combination was planned in advance of the filing and the filing was made solely to facilitate the combination in violation of the Clayton Act. Business combinations that violate the Clayton Act that are planned after the petition was filed (or even planned in advance but do not represent the cause for the filing) should not create cause for dismissing the petition. The amendment would be overinclusive because it threatens a cottage industry built on motions claiming cause for a violation of myriad federal or state regulatory schemes. Bankruptcy courts would necessarily become adept at processing such arguments quickly, risking the ultimate effect that any such motion is functionally ignored.

D. Agency Review of Less-Anticompetitive Alternatives

A different approach to accomplishing the goal of stronger antitrust review in bankruptcy is to amend the Hart-Scott-Rodino Act to provide an entirely new structure for agency investigation of bankruptcy business combinations. Under this proposed approach, the antitrust enforcement agencies would be given opportunity to investigate for up to 30 days after a bankruptcy-court ordered business combination to proceed in district court seeking injunctive relief. The injunction would be granted if the enforcement agency could demonstrate a less anticompetitive option for disposing of the assets that is not unreasonably unfair to the constituents of the bankruptcy estate.

Under this approach, the Department of Justice would have succeeded in preliminarily blocking the Sungard/Comdisco business combination, because would-be new entrant Hewlett Packard was willing and able to purchase the Comdisco assets. Likewise, the presence of alternate bidder Westinghouse in the Financial News Network asset sale would allow the FTC to achieve an injunction against the approved transaction on the basis of a less competitive alternative.

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270 See supra notes XX-YY and accompanying text.
271 Examples include American Airlines/TWA and Sungard/Comdisco.
272 See supra notes XX-YY and accompanying text.
The effect of such a 30-day post-sale-order agency review would be to create a shadow over bankruptcy business combinations that creates incentives for parties to the business combinations, as well as bankruptcy courts, to avoid anticompetitive business combinations. The effect would be similar to the current process of feasibility testing prior to plan confirmation: bankruptcy courts would gain little from approving a section 363(b) sale if the danger existed of a short-term injunction against the sale. Another effect of such an amendment would be to reduce the incentives to file bankruptcy in order to facilitate a business combination that is threatened with antitrust challenge.

**CONCLUSION**

Business combinations present antitrust concerns under the Clayton Act if the transaction would “tend to create a monopoly.” In the ordinary course such merger review proceeds according to well-defined and well-understood procedural rules and substantive standards, whether in district court or in the FTC administrative process. Generalist federal judges and the FTC can be assumed to be competent to enforce the Clayton Act with an appreciation of the competitive dynamics that underlie federal merger policy. Ordinary course merger review recognizes the competitive realities failing firms and declining industries present. In the common circumstance of business combinations’ occurring in bankruptcy, those well-defined procedures and substantive standards can be subordinated to a host of bankruptcy-specific rules and policies.

Commentators have noted that business combinations are so common as to have become a driving purpose for business bankruptcies. The bankruptcy code contains a parallel scheme for conducting business combinations after the bankruptcy filing. Two primary mechanisms operate to allow bankruptcy court review and approval of asset sales that meet the requirements of bankruptcy law. First and most common is the out of the ordinary course of business sale of assets under Code section 363(b). Second is the more procedurally involved sale of assets conducted as part of the plan of reorganization under Chapter 11.

The article demonstrates that identical competitive issues arise in the ordinary course and when the selling firm is in bankruptcy. But bankruptcy presents unique procedural challenges and countervailing substantive considerations. Procedures for review of asset sales in bankruptcy limit the opportunities for the antitrust enforcement agencies to conduct a careful analysis of the competitive consequences of the transaction. Bankruptcy courts may aim to maximize the value of the estate and to protect the interests of stake-holders. Those aims are in tension with antitrust goals of economic efficiency in service of consumer interests.
Those differences alter the antitrust analysis when merger review is conducted in the context of bankruptcy. The conflict creates a likelihood that anticompetitive mergers arising in the course of bankruptcy proceedings either (1) go unchallenged, or (2) survive over challenges that might have been successful outside of the bankruptcy context. The conflict between bankruptcy and antitrust will necessarily bring about underenforcement of the antitrust anti-merger prohibition relative to the optimum.

The paper addresses the optimal resolution of the conflict. Both bankruptcy and antitrust pursue end goals of protecting constituents who lack the bargaining power to protect themselves through contracting. The conflict is fundamentally a conflict between diffuse stakeholders in the bankrupt firm and diffuse consumers of the bankrupt firm’s output.

Tensions, where they arise, should be resolved in favor of consumers for three reasons. First, creditors have the *ex ante* ability to bargain for protection in a way that consumers do not. Second, merger policy outside of bankruptcy is a mature scheme that has developed through common law and legislative change since 1890; has been reduced to well understood principles in case-law, agency decisions, and enforcement guidelines; and as enforced for the past several decades is a minimalist scheme that favors allowing mergers to proceed if the merger promises efficiencies. Third, merger policy outside of bankruptcy incorporates efficiency considerations related to failing companies under the failing firm defense, protecting the policies of bankruptcy to the extent they are not inconsistent with antitrust goals.

Reform is appropriate to resolve this conflict and to move the level of antitrust review of bankruptcy asset sales toward the optimum. The paper closes by proposing several reform possibilities, a combination of which may be required to bring about the optimal balance between the goals of bankruptcy and those of antitrust.