Successor Liability Under the
Coal Industry Retiree Health Benefit Act of 1992

David J. Laurent
Michael D. Glass
*Polito & Smock, P.C.*
Pittsburgh, PA

Ethan D. Fogel
Joseph A. O’Connor
*Dechert Price & Rhodes*
Philadelphia, PA

Synopsis

§ 1.01. Background of the Coal Act. .......................................................... 2

§ 1.02. The Coal Act Imposes Liability on a Carefully Defined Group of Entities. ................................................................. 6

§ 1.03. Principles of Statutory Construction and Recent Case Law Endorse a Narrow View of Successor Liability Under the Coal Act. .................................................................................. 8

[1] — The First Circuit’s Recent Decision. ....................................... 9
[2] — Plain Meaning. ........................................................................ 10

[a] — A Signatory Operator’s “Successors” and Its “Successors in Interest” Are Treated Differently. 11

[b] — The Term “Related Person” Does Not Include a Signatory Operator’s “Successors” or “Successors in Interest.” .......................................................... 13

[c] — Intentional Omission. ............................................................. 15

[3] — Legislative History. .............................................................. 16
[4] — Legislative Purpose. ............................................................. 18

§ 1.04. The Social Security Administration’s Changing Interpretation. ......................................................................................... 22

§ 1.05. The Term “Successor in Interest” Should Be Interpreted to Mean a Corporate Law Successor. ................................................... 27

§ 1.06. The Only Successor Liability Under the Coal Act is that Imposed upon Corporate Law “Successors in Interest”. ................................................................. 31

§ 1.07. Coal Act Successorship in Bankruptcy Sales. ....................... 32

§ 1.08. The *Leckie* Decision. ......................................................... 33

§ 1.09. Bankruptcy Jurisdiction over Coal Act Successor Liability. ......................................................................................... 35
§ 1.01. **Background of the Coal Act.**

For over 40 years prior to the Coal Act’s enactment, retirees who had worked at coal mining operations represented by the United Mine Workers of America (“UMWA retirees”) received benefits from plans established and funded in accordance with the terms of collective bargaining agreements known as the National Bituminous Coal Wage Agreements (Coal Wage Agreement). Although the Employee Retirement Income Security Act of 1974 (ERISA)\(^2\) regulated in various ways the manner in which these benefit plans functioned, it did not separately require any Coal Wage Agreement signatory to provide or pay for the provision of health benefits for any UMWA retirees once that signatory’s Coal Wage Agreement expired.

The collectively bargained health benefit plans for UMWA retirees which existed prior to the Coal Act — the United Mine Workers of America 1950 and 1974 Benefit Plans and Trusts (“1950 or 1974 Benefit Plans”) — were the subject of intensive litigation during the 1980s. The litigation

---

focused on who, if anyone, should pay for the health benefits of UMWA retirees whose employers were out of business, or simply ceased to be signatory to a Coal Wage Agreement after 1978. The court decisions resolving this litigation ultimately determined that neither the signatory employer that had gone out of business or permanently ceased producing coal nor its affiliates were obligated to provide or pay contributions toward health benefits for UMWA retirees after its last Coal Wage Agreement expired. The net effect of these court decisions was that the 1974 Benefit Plan was required to provide benefits to an ever-growing population of UMWA retirees, while being funded by a shrinking base of contributing employers.

Although it is debatable whether the provision of health benefits to UMWA retirees truly can be considered to have reached a crisis by the end of the 1980s, Secretary of Labor Elizabeth Dole appointed a Commission to study the issue. The Coal Commission issued its Report

---

3 Liability for retiree health benefits for companies that ceased to be signatory to a Coal Wage Agreement or went out of business prior to 1978 was not an issue since there was no dispute that the retirees could receive benefits from the 1950 or 1974 Benefit Plans. Beginning with the 1978 Coal Wage Agreement, however, each signatory was required to provide benefits to current and future retirees directly by way of an Individual Employer Plan (IEP). Thus, the litigation focused on who, if anyone, should provide benefits to this group of retirees — the signatory, an affiliate of the signatory, or the 1974 Benefit Plan.


5 Those who saw a crisis arising from this situation point to the rapidly rising cost per active employee man hour of financing these benefits, coupled with a shrinking base of employers left to pay for the benefits. Those who, instead, saw the normal and expected continuation of a phenomenon that had been going on for decades (and hence not a crisis), invite attention to the stable tonnage produced by the smaller number of bigger companies that increasingly dominated the industry’s rapidly consolidating UMWA-organized sector.
on November 5, 1990. Based in large part on the Report, Congress enacted the Coal Act in late 1992.6

The Coal Act is unique in the annals of employee benefits legislation. Despite the extensive regulation of pension and benefit plans under ERISA, including the requirement that employers withdrawing from pension plans pay withdrawal liability and meet other funding obligations,7 ERISA did not impose any funding or withdrawal liability obligations on employers that sponsored health benefit plans. Further, courts routinely held that the obligation to provide or fund post-employment retiree health benefits turned on an interpretation of the particular collective bargaining agreement and related plan documents, applying traditional contract principles rather than federal law.8

Congress, through the Coal Act, dramatically altered this landscape. For the first time, Congress required certain entities to fund the cost of health benefits, for life, for specified UMWA retirees and their dependents (well over 100,000 beneficiaries), regardless of whether those entities still had any contractual obligation concerning those retirees, or were still in the coal business. Thus, the Coal Act supplanted a collectively bargained program with a novel and far-reaching statutory program.

The statutory program includes two basic components. The first component concerns the beneficiaries already in the 1950 and 1974 Benefit Plans as of July 20, 1992. Congress created the United Mine Workers of

---


America Combined Benefit Fund (“Combined Fund”), and directed it to assume responsibility for all such UMWA retirees, and provide benefits to those individuals based on a financing scheme which, among other things, involves the assessment of annual premiums against the signatory operators who have been assigned beneficiaries from that Fund by the Social Security Administration (SSA).

The second component of this new statutory program concerns the provision of benefits to UMWA retirees (and their dependents) who were not in the 1950 or 1974 Benefit Plans as of July 20, 1992, but nevertheless entered such Plans before February 1, 1993, or were receiving retiree health benefits from Coal Wage Agreement signatories directly through an IEP as of February 1, 1993. With respect to the UMWA retirees who were receiving benefits from an IEP, the Coal Act requires the signatories to continue to provide those benefits for life, and to provide the same benefits to miners (and their dependents) that retired by September 30, 1994.9 Additionally, for UMWA retirees (and their dependents) from this group who become orphans in the future, as well as those who entered the old Plans after July 20, 1992 but before February 1, 1993, the Coal Act created the United Mine Workers of America 1992 Benefit Plan (“1992 Plan”) to provide benefits to such orphans and to charge premiums to a select group of signatory operators to finance those benefits.10

To accomplish these objectives, the Coal Act added two far-reaching provisions. First, Congress imposed liability on those signatory operators that had employed the involved UMWA retirees at some point in time, but then extended that liability to a host of other entities defined as “related persons” and, in some circumstances, “successors in interest.”11 Second, Congress sought to coerce compliance by including an onerous $100 per day penalty for failing to make the required payments to the Combined Fund.12

---

9 26 U.S.C.S. 9711(b).
10 The term “orphan” is used here to describe beneficiaries who are not assigned to any particular signatory operator.
11 26 U.S.C. §§ 9701(c), 9704(a), and 9711(g)(1).
§ 1.02. The Coal Act Imposes Liability on a Carefully Defined Group of Entities.

The Coal Act initially imposes liability on signatory operators. A signatory operator is “a person which is or was signatory to a Coal Wage Agreement.”\(^\text{13}\)

A signatory operator is responsible for paying annual premiums to the Combined Fund.\(^\text{14}\) Additionally, a signatory operator that is also a “last signatory operator,” \textit{i.e.}, “the most recent coal industry employer of [a particular] retiree,”\(^\text{15}\) must continue to provide retiree health benefits to the UMWA retirees in its Individual Employer Plan (IEP). Finally, a signatory operator that is also a “1988 last signatory operator,” \textit{i.e.}, the “last signatory operator” which is also a 1988 agreement operator,\(^\text{16}\) must make a variety of payments to the UMWA 1992 Benefit Plan.\(^\text{17}\)

The Coal Act broadly reaches out to impose liability on a signatory operator’s “related persons,” which term includes three specifically enumerated categories of entities, as well as the “successors in interest” of the enumerated entities. The Coal Act defines the term “related persons” in Section 9701(c)(2) as follows:

(A) In general. A person shall be considered to be a related person to a signatory operator \textit{if that person is} —

(i) a member of the controlled group of corporations (within the meaning of Section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under Section 52(b)) with such signatory operator; or

---

18 For purposes of this chapter, the generic term “signatory operator” will be used to collectively refer to “signatory operators,” “last signatory operators” and “1988 last signatory operators.”
(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

(B) Time for Determination. The relationship described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.\textsuperscript{19}

The Coal Act also includes two provisions which directly address the liability of a signatory operator’s “successors” and “successors in interest.” The first provision, Section 9706(b)(2)(which only concerns liability for annual premiums owed to the Combined Fund) provides as follows:

Reassignment Upon Purchase. If a person becomes a successor of an assigned operator after the enactment date [October 24, 1992], the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.\textsuperscript{20}

\textsuperscript{19} 26 U.S.C. § 9701(c)(2)(emphasis added).

\textsuperscript{20} 26 U.S.C. § 9706(b)(2)(emphasis added).
The second provision, Section 9711(g) (which only concerns a signatory operator’s IEP and 1992 Plan obligations) states as follows:

(g) Rules Applicable to this part and part II.\(^{21}\) For purposes of this part and part II —

(1) Successor. The term “last signatory operator” shall include a successor in interest of such operator.

(2) Reassignment Upon Purchase. If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 Benefit Plan of any transfer described in this paragraph.\(^{22}\)

§ 1.03. Principles of Statutory Construction and Recent Case Law Endorse a Narrow View of Successor Liability Under the Coal Act.

The Coal Act imposes only very limited forms of successor liability. Generally, the sale of a signatory operator’s stock should not affect the signatory operator’s Coal Act obligations. In other words, whatever liabilities attached in the first instance should remain with that entity despite a change in the owners of its stock;\(^{23}\) however, such a sale may

\(^{21}\) Parts I and II refer to IEP and 1992 Plan obligations.

\(^{22}\) 26 U.S.C. § 9711(g)(emphasis added).

\(^{23}\) This view is consistent with that adopted by the National Labor Relations Board for use under the National Labor Relations Act, see, e.g., Rockwood Energy and Minerals Corp., 299 N.L.R.B. 1136 (1990), enforced, 942 F.2d 169 (3d Cir. 1991) and Esmark, Inc. v. NLRB, 887 F.2d 739 (7th Cir. 1984), as well as that used under the Comprehensive
SUCCESSOR LIABILITY

§ 1.03

affect the identity of the signatory operator’s “related persons,” since that determination is to be made as of July 20, 1992, or the date upon which the signatory operator ceased to be in business, if earlier.

In contrast, the Coal Act’s inclusion of various language concerning “successors” and “successors in interest” indicates Congress’ intent to impose only limited forms of successor liability on asset purchasers. Specifically, it appears that an asset purchaser should be liable for the seller’s Coal Act obligations only where:

(1) the transaction occurred after the Coal Act was enacted and (a) the purchaser voluntarily agreed to assume a selling signatory operator’s Coal Act obligations, or (b) the matter involves only IEP or 1992 Plan obligations and the purchaser is a “successor in interest” of a selling signatory operator, with the term “successor in interest” being defined as one who would be held liable for the seller’s debts under traditional state corporate law principles; or

(2) the transaction occurred at any time and the purchaser is a “successor in interest” of a selling “related person,” with the term “successor in interest” being defined as above.

Moreover, regardless of what Coal Act liability may be imposed on an asset purchaser in general, it further appears that sales conducted under the auspices of the Bankruptcy Code can be made free and clear of any Coal Act obligations.24


The issue of successor liability was recently addressed by the United States Court of Appeals for the First Circuit in *Eastern Enterprises v. Chater*.25 The court considered this issue under Section 9706(a),26 which sets forth the scheme SSA must use in assigning retired miners (and their eligible dependents) from the Combined Fund to signatory operators.

---


24 See §§ 1.07 - 1.12.

25 *Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997).

Section 9706(a) expressly states that SSA should assign such miners to the signatory operators that employed them and their “related persons,” based largely on when and how long they employed the miners. Eastern argued that Section 9706(a) was ambiguous by virtue of its silence with respect to making assignments to a signatory operator’s “successors,” and that SSA should “have filled the resultant vacuum” by taking the miners that had been assigned to Eastern — the signatory operator that had employed them— and instead assigning them to Eastern’s “successor.”

The First Circuit rejected this interpretation of Section 9706(a).

Initially, the First Circuit pointed to the well settled principle of statutory construction that “when ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in its disparate inclusion or exclusion.’” The First Circuit then observed that while Congress addressed successorship in Section 9706(b)(2), it neglected to do so in the assignment provisions of Section 9706(a). The First Circuit therefore reasoned that “reviewing the language and architecture of the Coal Act as a whole . . . we think it obvious that Congress purposely omitted any reference to successors in writing Section 9706(a)’s assignment scheme.”

An in-depth analysis of this subject under all of the applicable principles of statutory construction corroborates the First Circuit’s conclusion in Eastern Enterprises, and warrants an application of that same narrow approach to successor liability under other provisions of the Coal Act.


Statutory interpretation naturally begins with an examination of the statute’s text. The plain meaning interpretation of an unambiguous statute
SUCCESSOR LIABILITY

is generally conclusive since statutory language is “the most reliable indicator of congressional intent.” 32 Thus, “when [a court] finds the terms of a statute unambiguous, judicial inquiry is complete.” 33 Under this plain meaning approach, it is clear that the Coal Act imposes no liability on a signatory operator’s “successors,” and only limited liability — IEP and 1992 Benefit Plan obligations — on its “successors in interest.”

[a] — A Signatory Operator’s “Successors” and Its “Successors in Interest” Are Treated Differently.

The Coal Act specifically identifies the rights and obligations of a signatory operator’s “successors” in two places, one involving the Combined Fund and the other, in Subchapter C, involving IEP and 1992 Plan obligations. The provision involving the Combined Fund simply states that “if a person becomes a successor of an assigned operator 34 after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary . . . to such successor . . . [but] the assigned operator transferring such assignment . . . shall remain the guarantor of the benefits.” 35 This language is narrow, says nothing about a pre-enactment successor, and makes a post-enactment successor’s liability turn exclusively on whether it voluntarily elects to assume the signatory operator’s obligations. 36

32 Central States Southeast and Southwest Areas Pension Fund v. Bell Transit Co., 22 F.3d 706, 710 (7th Cir. 1994). See also In re TMI, 67 F.3d 1119, 1123 (3d Cir. 1995), cert. denied, 116 S. Ct. 1034, (1996) (“Courts presume that Congress expressed its legislative intent through the ordinary meaning of the words it chose to use, and if the statutory language is unambiguous, the plain meaning of the words ordinarily is regarded as conclusive.”)
34 An “assigned operator” is a signatory operator that had been assigned an eligible beneficiary from the Combined Benefit Fund. 26 U.S.C. § 9701(c)(5).
36 The rationale for viewing this as an obligation which can, but need not be assumed, is two-fold. First, by saying the signatory operator “may transfer” this obligation, the language implies that the signatory operator may equally choose not to transfer the liability. Second, this reading is confirmed by the last sentence in Section 9706(b)(2), which states
The “successor” language in Subchapter C concerning IEP and 1992 Plan obligations is nearly identical to that set forth above. Section 9711(g)(2) states that “[i]f a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor shall be treated as the last signatory operator . . . [but] the . . . operator transferring such assignment . . . shall remain the guarantor of the benefits. . . .”\(^{37}\) As observed above, this language on its face says nothing about a pre-enactment successor, and makes a post-enactment successor’s liability turn on whether it voluntarily chooses to assume that liability. Indeed, given that the IEP and 1992 Benefit Plan obligations are more diverse than those relating to the Combined Fund, the permissive, but non-mandatory, reference to transferring “any liability” is an even stronger indicator that a successor may voluntarily choose to assume some, none, or all of a signatory operator’s IEP and 1992 Benefit Plan obligations.

The Coal Act also contains one provision which refers to a signatory operator’s “successors in interest” — 26 U.S.C. § 9711(g)(1).\(^{38}\) This provision deals with IEP and 1992 Plan obligations and states simply that, for purposes of Section 9711 and 9712 of Subchapter C, “[t]he term ‘last signatory operator’ shall include a successor in interest of such operator.”\(^{39}\) Unlike the two provisions dealing with “successors,” however, this language does not make the assumption of liability voluntary. Instead, this language extends a signatory operator’s IEP and 1992 Plan obligations to its “successors in interest” as a matter of law.\(^{40}\) This provision is strikingly absent from the assignment scheme applicable to the Combined Fund.


\(^{38}\) The Coal Act also includes a provision which refers to the “successors in interest” of “related persons” — § 9701(c)(2)(A); however, as explained below in the text, this provision does not apply to signatory operators.

\(^{39}\) 26 U.S.C. 9711(g)(i).

\(^{40}\) It is noteworthy that the Coal Act does not include a similar provision for purposes of Combined Fund obligations.
[b] — The Term “Related Person” Does Not Include a Signatory Operator’s “Successors” or “Successors in Interest.”

The term “related person” does not, on its face, include a signatory operator’s “successors” or “successors in interest.” Congress expressly defined the term “related person” in Section 9701(c)(2)(A) as encompassing four specified groups: (i) the other members of the signatory operator’s control group, (ii) any trade or business under common control with the signatory operator, (iii) any person having a partnership interest (other than a limited partnership) with the signatory operator in a business that employed eligible beneficiaries, and (iv) a successor in interest “of any person described in clause (i), (ii), or (iii).”\(^{41}\) This language plainly connects the term “successor in interest” with the specific “related persons” defined in clauses (i)-(iii), but not the “signatory operator.” Therefore, since the language in clauses (i)-(iii) is designed to define persons other than the signatory operator, it reasonably follows that the language extending “related person” status to the “successors in interest” of any person described in clauses (i), (ii), or (iii), necessarily refers to the “successors in interest” of someone other than the signatory operator.

Moreover, given the specificity with which the term “related person” is defined in clauses (i), (ii), and (iii) of Section 9701(c)(2)(A), the absence of a specific reference to a signatory operator’s “successors in interest” appears to have been an intentional omission, particularly when that section is viewed in context with the remainder of the Coal Act.

For example, in Subchapter C of the Coal Act, which concerns IEP and 1992 Plan obligations, Congress expressly extended a signatory operator’s obligations to its “successors in interest” in Section 9711(g)(1).\(^{42}\) The absence of equally clear language in the definition of “related persons” obviously suggests a different intent for that term.

Moreover, if the term “related persons” is interpreted as including a signatory operator’s “successors in interest,” then Section 9711(g)(1) of Subchapter C would be mere surplusage. Section 9711(c)\(^{43}\) provides that

---

43 26 U.S.C. § 9711(c).
“[e]ach related person of a signatory operator to which subsection (a) or (b) [relating to IEP obligations] applies shall be jointly and severally liable with the last signatory operator for the provision of health care coverage described in subsection (a) or (b).” Section 9712(d)(4)\(^44\) similarly provides that “[a] 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this Section.” Thus, since the foregoing provision extends a signatory operator’s obligations to its “related persons,” then there is no reason to separately extend those obligations to the signatory operator’s successors in interest in Section 9711(g)(1), if those successors in interest are “related persons.” Alternatively, if the term “related persons” does not include the “successors in interest” of a signatory operator, then Section 9711(g)(1) makes sense as a provision which creates a limited form of successor liability. Therefore, since it is well settled that an interpretation of a statute which renders any provision meaningless, redundant, or superfluous should be avoided,\(^45\) it follows that the term “related persons” should not be interpreted as including the “successors in interest” of a signatory operator and, instead, should be


\(^{45}\) Bailey v. United States, 116 S. Ct. 501, 507 (1995)(“Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting . . . .”) quoting Ratelaf v. U.S., 114 S. Ct. 665, 659. Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 833-34 (9th Cir. 1996)(“[A] statute must be interpreted to give significance to all of its parts. [Citation omitted.] We have long followed the principle that ’[s]tatutes should not be construed to make surplusage of any provision.’”) citing Wilshire Westwood Assoc., 881 F.2d at 804; United States v. Lamere, 980 F.2d 506, 513 (8th Cir. 1992)(“[W]ords employed in a statute should not be discarded as being mere surplusage or being meaningless. This rule applies, in particular force, where such terms are included in some sections and excluded in other sections of the same Act.”); Zimmerman v. North American Signal Co., 704 F.2d 347, 353 (7th Cir. 1983)(“As a general rule, a court should not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous.”); National Insulation Transportation Comm’n v. Interstate Commerce Comm’n, 683 F.2d 533, 537 (D.C. Cir. 1982)(“A court must, if possible, give effect to every phrase of a statute so that no part is rendered superfluous.”); State of New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985)(“Without a clear congressional command otherwise, we will not construe a statute in a way that makes some of its provisions surplusage.”)
SUCCESSOR LIABILITY § 1.03

interpreted as including only the “successors in interest” of the other entities expressly enumerated in clauses (i)-(iii) of Section 9701(c)(2)(A). 46

[c] — Intentional Omission.

As the First Circuit recounted in Eastern Enterprises, 47 it is well settled that “when Congress includes particular language in one section, but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposefully in its disparate inclusion or exclusion.” 48 Stated otherwise, “[w]here Congress knows how to say something but chooses not to, its silence is controlling.” 49 Thus, “[w]hen Congress includes a specific term in one section of a statute but omits it in another, it should not be implied where it is excluded.” 50

This same point also is expressed in the doctrine of inclusio unius est exclusio alterius, which “informs the court to exclude from operation those items not included in a list of elements that are given effect expressly by the statutory language.” 51 Thus, statutory language “is as significant for what it omits as for what it says.” 52

46 In United Mine Workers of America 1992 Benefit Plan v. Leckie Smokeless Coal Co., 99 F.3d 573 (4th Cir. 1996), the Court of Appeals for the Fourth Circuit assumed, in dicta and without any real analysis, that the term “related persons” includes a signatory operator’s “successors in interest.” Id. at 597. As shown above, however, the text of the statutory provision simply does not support that construction.

47 110 F.3d 150.


49 In re Haas, 48 F.3d 1153, 1156 (11th Cir. 1995). See also Garcia v. United States, 88 F.3d 318, 324 (5th Cir. 1996).


52 In re TMI, 67 F.3d at 1123, quoting Williams v. Wohlgamuth, 540 F.2d 163, 169.
As explained above, the Coal Act on its face imposes no obligations on a signatory operator’s “successors,” and imposes only IEP and 1992 Plan obligations on a signatory operator’s “successors in interest.” At the same time, the Coal Act separately engrafts “related person” liabilities onto a “related person’s” “successors in interest,” and permits, but does not require, a signatory operator’s “successors” to assume some or all of the operator’s Coal Act obligations, so long as the signatory operator remains a guarantor. This inclusion of several narrow references to the rights and obligations of a “successor” or “successor in interest” is strong evidence that Congress did not intend to include any others and, instead, intentionally omitted them. Moreover, this plain meaning interpretation is fully consistent with other well settled rules of statutory interpretation.


“Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but ‘[i]n the absence of a clearly expressed legislative intent to the contrary,’ the language of the statute itself ordinarily must be regarded as conclusive.”\(^{53}\) Indeed, the plain language of a statute will control in the absence of “explicit legislative intent to the contrary.”\(^{54}\) Thus, “legislative history is irrelevant to an unambiguous statute,\(^{55}\) since “an analysis of legislative history is proper only to solve, not to create an ambiguity.”\(^{56}\)

Given the lack of ambiguity in the Coal Act’s narrow use of the terms “successors” and “successors in interest,” no resort to legislative history should be appropriate. In any event, however, nothing in the legislative

---


\(^{54}\) Williams v. U.S. Merit Protection Board, 15 F.3d 46, 49 (4th Cir. 1994). See also United States v. National Steel Corp., 75 F.3d 1146, 1149 (7th Cir. 1996)(“[T]here is no basis in any responsible theory of statutory interpretation for using legislative history to change the meaning of a statute that is clear on its face and does not, if read literally, produce an absurd or unsound result.”)


\(^{56}\) Arizona Electric Power Cooper., Inc. v. United States, 816 F.2d 1366, 1375 (9th Cir. 1987).
history of the Coal Act supports a deviation from the plain meaning interpretation discussed above.

There are two general references in the legislative history to “successors.” The Senate’s Conference Report concerning the Coal Act states that the term “related persons” includes “in specific instances successors to the Collective Bargaining Agreement obligations of the signatory operator. . . .”57 Similarly, Senator Rockefeller, one of the Coal Act’s sponsors, stated on the Senate floor that “[t]he term ‘signatory operator,’ as defined in new Section 9701(c)(1), includes a successor in interest of such operator.”58

The foregoing legislative history is meaningless since neither of the foregoing statements can be squared with the text of the provisions they purport to be discussing. First, neither explains why the “successors in interest” language in the definition of “related persons” expressly refers to the three preceding types of related persons, but fails to reference a fourth — signatory operators. Second, neither explains why post-enactment “successors” were expressly given an option to assume some or all of a signatory operator’s Coal Act obligations, which makes no sense if a signatory operator’s obligations automatically flow to such a “successor.” Third, the two statements are inconsistent as to the importance of having assumed the signatory operator’s collective bargaining obligations. This inconsistency is significant since it could drastically narrow the scope of possible successors by excluding purchasers who acquired the assets after the signatory operator ceased to be a signatory. Fourth, the statements fail to explain why the actual text of the provision which defines the term signatory operator — 9701(c)(1) — fails to include any reference to successors.

Thus, given that the foregoing legislative history includes only two very brief statements concerning successors, and given that those statements are at odds with the plain language of the statute and fail to explain their own inconsistency regarding the significance of the purchaser’s signatory status, the legislative history falls well short of that needed to override the plain language interpretation set forth above.

“Congressmen typically vote on the language of a bill,’ not on isolated
remarks of individual lawmakers or other indicia of legislative history.”59
Thus, since “Congress enacted [a statute], not its accompanying legislative
reports . . . . [we] have no authority to limit the scope of a clear statutory
term by recourse to the views of a legislative subgroup.”60 This is so
even if there are minor inconsistencies between the terms of the statute
and the legislative history.61 Accordingly, ambiguous legislative history
of the sort involved here cannot be used to expand the plain meaning of
the limited statutory successorship provisions Congress included in the
Coal Act.62

Although the purpose of a statute may be relevant in some contexts,
it is not material to determining whether Coal Act obligations should be
imposed on “successors” or “successors in interest” in circumstances other
than those expressly set forth in the plain text of the statute. As the Supreme
Court explained:
Application of “broad purposes” of legislation at the expense
of specific provisions ignores the complexity of the problems

Pierce County, 476 U.S. 253, 262 (1986)(“[s]tatements by individual legislators should
not be given controlling effect, but when they are consistent with the statutory language
and other legislative history, they provide evidence of Congress’ intent.”)(emphasis added).
60 In re Moore, 907 F.2d at 1479.
62 See Toibb, 501 U.S. at 162 (“[T]he scant history on this precise issue does not suggest
a ‘clearly expressed legislative inten[t] . . . contrary’ . . . to the plain language” and,
indeed, the “apparently conflicting views tend to negate the suggestion that Congress . . .
operated with a clear intent to [achieve a particular objective].”); Lutheran Hospital of
Indiana v. Businessmen’s Assurance Co. of America, 51 F.3d 1308, 1313 n. 5 (7th Cir.
1995)(“A snippet of legislative history does not normally trump the plain language of a
statute . . . .”); Strickland v. Comm’r, Maine Department of Human Services, 48 F.3d 12,
19 (1st Cir. 1995)(a lone reference to the subject in a House report “is too slender a reed
to be accorded controlling weight under the totality of the circumstances that obtain
here.”); Adams v. Dole, 927 F.2d 771, 777-78 (4th Cir. 1991)(“Both sides rely on the
legislative history to support their positions, but that, too, is ambiguous and provides no
reason to question our conclusion.”)
SUCCESSOR LIABILITY

Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the “plain purpose” of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent. 63

Indeed, “the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone.” 64 Thus, for this reason, “it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.” 65

Moreover, a legislative enactment’s purpose or policy goals generally do not justify creating a form of liability that was omitted from the language of a detailed statutory scheme. “[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage to subsume other remedies.” 66

The Coal Act obviously contains a detailed scheme for assigning miners. Therefore, under the foregoing rules of statutory construction, the Coal Act’s policy goals or purposes do not warrant inferring any additional terms supporting assignments to a signatory operator’s successors.

63 Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 373-74 (1986). See also National Coal Association v. Chater, 81 F.3d 1077, 1082 (11th Cir. 1996); Trustees of the Chicago Truck Drivers, Helpers, and Warehouse Workers Union (Independent) Pension Fund v. Leaseway Transportation Corp., 76 F.3d 824, 830 (7th Cir. 1996); Central States, Southeast and Southwest Area Health and Welfare Fund v. Cullum Companies, 973 F.2d 1333 (7th Cir. 1992).


65 Rodriguez, 480 U.S. at 526.

Further, construing the Coal Act as not imposing any successor liability beyond that imposed by the plain language of the statute is entirely consistent with the Coal Act’s policy goals and purpose. In Carbon Fuel Co. v. USX Corp., the court was asked to decide whether, as a matter of law, a signatory operator’s pre-enactment successors were responsible for its Coal Act obligations concerning the Combined Fund. The court held that a signatory operator’s successors were not liable for those obligations. The court reasoned that the Coal Act was intended to impose liability only on the signatory operator that benefitted from the retirees’ work, even if that signatory operator later bargained out of its obligations by transferring its operations to another person:

Congress intended the Coal Act to reach back and impose liability on the signatory operators who had contracted out of their obligations to fund retiree benefits. Allowing the enforcement of those contracts expressly undermines the intent and purpose of the Coal Act as expressed in the Conference Agreement “that those companies which employed the retirees in question, and thereby benefited from their services . . . be assigned responsibility for providing the health care benefits promised.” 138 Cong. Rec. S17566-01, 17603. While the Act expressly recognizes that post-Act contracts may be entered into in order to transfer that liability as long as the original assignee remains the guarantor of the premiums, the Act contains no similar provisions for pre-Act contracts.

Indeed, Congress did allow for “a type of” secondary liability with respect to post-Act contracts. However, Congress did not provide for any liability other than that created by the Act. And Congress made clear that the Act would “expressly” determine all liability. The failure to allow for secondary liability based on pre-Act private contracts is not surprising

67 Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir. 1996).
68 Coal Act obligations concerning IEPs and the 1992 Plan were not material to this case.
SUCCESSOR LIABILITY

given Congress’ expressed intent to “reach back” and impose the obligation to fund retirement benefits on those signatory operators who had “bargained out of their funding obligations.”

The foregoing comments strongly support a conclusion that the Coal Act’s policy goals and purposes would not be furthered by expanding the Act’s narrow successor liability provisions, since that would undercut the basic objective of confining liability to the signatory operator that benefitted from the miners’ services (as well as those related persons and those who shared an ownership interest with the signatory operator).

Finally, there simply is no reason to infer additional successor-type liabilities. Congress stated that the Coal Act was designed “to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits . . . .” To accomplish this objective, Congress created a comprehensive financing scheme which assumed that a large number of beneficiaries — known as orphans — would not be assigned (or remain assigned) to any particular signatory operator. Recognizing this circumstance, Congress fulfilled its objective of providing benefits for such orphans in several ways.

With respect to the Combined Fund, the Coal Act provides for annual transfers from the 1950 Pension Plan and later, the Abandoned Mine Lands Trust. The Coal Act also provides a means by which signatory operators can be required to pay additional annual premiums to rectify a shortfall from a prior year. With respect to the 1992 Plan, the Coal Act similarly requires signatory operators to pay annual prefunding premiums in the amount needed to cover the cost of providing benefits to such orphans. Thus, the Coal Act expressly secures benefits for all such orphans.

Accordingly, there is no reason to infer additional successor-type forms of liability to protect against the addition of new orphans since the financing

69 Carbon Fuel, 100 F.3d at 1134, 1135.
70 Public Law 102-486, § 19142(b)(3).
71 See 26 U.S.C. §§ 9704(b)(2)(A) and 9705.
73 26 U.S.C. § 9704(d). In 1997, for the first time, the 1992 Plan significantly increased the annual prefunding premium to provide benefits to a large influx of new orphans as a result of Westmoreland Coal Co.’s bankruptcy.
scheme Congress established already accounts for that risk. This is particularly true given that the clear statutory language of the Coal Act, as well as settled principles of statutory construction, weigh heavily against any such expansion of Congress’ chosen liability parameters.

§ 1.04. The Social Security Administration’s Changing Interpretation.

The Social Security Administration (SSA) — the entity charged with assigning the beneficiaries in the Combined Fund to signatory operators\(^74\) — initially interpreted the Coal Act as not imposing any liability on the “successors” or “successor in interest” of signatory operators. SSA issued a series of internal instructions for implementing its Coal Act obligations regarding the assignment of beneficiaries. In one of these Instructions, Transmittal No. 7, dated August 1993, SSA stated that assignments should be made to signatory operators (and their related persons if they are out of business), and then added that “[i]f no assignment can be made under these criteria, the miner is treated as ‘unassigned.’”\(^75\) Moreover, in these same instructions, SSA defined the term “related persons” as including only four (4) entities: (1) a member of the signatory operator’s control group, (2) a member of a trade or business under common control with the signatory operator, (3) a partner (other than a limited partner) in a business with a signatory operator that employed eligible miners, and (4) “a successor in interest to one of the preceding entities.”\(^76\) Significantly, SSA did not indicate that there was any other type of “successor” or “successor in interest” liability. Thus, SSA initially adopted the plain meaning interpretation discussed above.

Next, in a set of instructions issued in January, 1994,\(^77\) SSA defined the terms “successor,” “successor company,” and “successor in interest” as follows:

---

\(^{74}\) See 26 U.S.C. § 9706.
\(^{75}\) See Transmittal No. 7 at RM T0402.003A.1-2 (on file with author).
\(^{76}\) See Transmittal No. 7 at RM T0402.002 (emphasis added, on file with author).
\(^{77}\) Transmittal No. 9.
A successor is a replacement; one who follows or comes into place of another. The term is applied to a sole corporation or to any corporation.

A company is a successor company if it was a signatory to an UMWA coal wage agreement and either: Expressly assumed health and death benefit obligations of retired persons last employed by the predecessor company . . . . or Implicitly assumed these obligations through promises of coverage or similar acts.

If no explicit or implicit assumption of obligations has occurred, then a company is a successor company if: the new company has signed an UMWA wage agreement . . . .

A successor in interest is one (or more) successive owners who follow another in ownership or control of property. In order to be a successor in interest, a party must continue to retain the same rights as the original owner. The term ordinarily indicates statutory succession as, for instance, when a corporation changes its name but retains the same property. As used in a statute affecting transfers of property with intent to defraud creditors and making such transfers void as against all creditors and their “successors in interest,” the term also includes the assignees of such creditors.78

Although SSA defined the term “successor company” in the foregoing instructions, it did not separately indicate that a “successor company” could be held liable for a signatory operator’s Coal Act assignments from the Combined Fund. Additionally, it is noteworthy that SSA narrowly defined the term “successor in interest” as one who could be held liable for its predecessor’s obligations under standard corporate law principles.

Later, in a set of instructions issued in December, 1994 (two years after the Coal Act’s enactment), SSA, for the first time, stated that, under certain circumstances, a successor company (as defined above) could be held liable for a signatory operator’s Coal Act assignments from the

78 Transmittal No. 9 at RM T01402.051-2-052A.1.
Combined Fund. Specifically, SSA determined that if the signatory operator was out of business and there was an entity that could be considered a successor company, *i.e.*, an entity that had assumed a signatory operator’s UMWA retiree health benefit obligations and/or itself was signatory to an NBCWA, then that successor company would be liable for the signatory operator’s Coal Act assignments; however, if the signatory operator was still in business, then the fact that there was a successor company was irrelevant and the liability remained with the signatory operator. Curiously, SSA offered no rationale for making the successor’s liability turn on the business status of the signatory operator, let alone why it adopted this new interpretation of the Coal Act.

Finally, in July, 1995, SSA issued instructions which, for the first time, expressly stated that a signatory operator’s “successor” and “successor in interest” were included in the definition of “related persons.” Again, however, SSA offered no credible rationale for this change in position. SSA stated in this regard as follows:

Although there is a provision in the Coal Act for assignments to “successors” and “successors in interest” to “related persons,” the Coal Act does not specifically provide for assignments to “successors” or “successors in interest” to signatory operators. However, the Coal Act does permit assignments to “successors” and “successors in interest” to defunct (inactive) signatory operators.

Based on the above, “successors” and “successors in interest” are another type of related person. . . .

Unfortunately, the Coal Act does not, as SSA apparently assumed, authorize SSA to assign beneficiaries to the “successors” or “successors in interest” of any signatory operators, much less only to defunct signatory operators. Indeed, SSA points to no such provisions and none exist. Moreover, SSA failed to explain how an entirely new category of “related persons” could be added to a detailed statutory provision that patently omits such a category. Finally, SSA offered no rationale for abandoning its earlier

---

79 Supplemental Coal Act Review Instruction No. 3 at 34-6.
80 Supplemental Coal Act Review Instructions No. 4 at 3.
interpretation of this very same provision. Therefore, SSA’s interpretation of these terms is not entitled to any credibility or deference.

Ordinarily, an administrative agency’s interpretation of a statute it administers is entitled to deference by the courts.\(^{81}\) Several well settled principles of administrative law, however, establish that SSA’s position on assignments to a signatory operator’s “successors” or “successors in interest” is not entitled to any deference.

First. Since issues of law — such as statutory interpretation — are subject to plenary review,\(^{82}\) “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”\(^{83}\) Thus, “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”\(^{84}\)

Moreover, even if a statute is ambiguous, “the deference owed to an agency construction of a statute depends substantially on the persuasiveness of the agency view, and the Supreme Court has reasoned that a position without reasoning has little power to persuade.”\(^{85}\) Thus, although a court must defer to an agency’s reasonable interpretation of an ambiguous statute, it should not defer where the agency’s construction goes beyond the meaning the statute can bear,\(^{86}\) or is not consistent with the statutory mandate.\(^{87}\)

Here, SSA’s latest determination that “successors” and “successors in interest” of signatory operators can be assigned beneficiaries pursuant to Section 9706(a) flatly contradicts the plain and ambiguous language of Section 9706(a), particularly when these terms are examined in context with the remainder of the Coal Act.\(^{88}\) Further, even if the Coal Act is


\(^{82}\) Dole v. East Penn Manufacturing, Inc., 894 F.2d 640, 643 (3d Cir. 1980).

\(^{83}\) Chevron, 467 U.S. at 843, n.9; McComb v. Wambaugh, 934 F.2d 474, 481 (3d Cir. 1991).


\(^{85}\) Director, OWCP v. Mangifest, 826 F.2d 1318, 1324 n.12 (3d Cir. 1987).

\(^{86}\) MCI Telecommunications v. AT&T, 114 S. Ct. 2223, 2231 (1994).

\(^{87}\) Sarasota Mem. Hosp. v. Shalala, 60 F.3d 1507, 1511 (11th Cir. 1995).

\(^{88}\) See Eastern Enterprises, 110 F.3d at 155.
ambiguous in this regard, SSA has not offered any reasonable explanation for how it reached its conclusion under the traditional rules of statutory construction. Thus, SSA’s interpretation is wholly unpersuasive and goes well beyond what the actual text of the statute can bear. Therefore, SSA’s interpretation on this issue should not be entitled to any deference.

Second. Interpreting terms such as “related persons,” “successors,” and “successors in interest” is not something that is within SSA’s specific area of expertise. Therefore, little or no deference is owed to SSA’s interpretation.89

Third. Little or no deference is owed where the agency changes its interpretation of the applicable standards without providing a rational basis for the change. “As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.”90 Thus, “[i]t is settled that where an agency departs from established precedent without announcing a principled reason for such a reversal, its action is arbitrary [citations omitted] and an abuse of discretion [citations omitted] and should be reversed.”91

In this case, when SSA issued its Supplemental Coal Act Review Instructions No. 4 in July 1995, it completely reversed its prior position with respect to assignments to “successors” and “successors in interest” of signatory operators. As explained above, however, SSA’s only explanation for this reversal — that “the Coal Act does permit assignments to ‘successors’ and ‘successors in interest’ to defunct (inactive) signatory operators” — is wholly inconsistent with the statute’s plain language.

Fourth. SSA’s Instructions setting forth its new interpretation are in the form of internal guidelines. These guidelines were never subject to “notice and comment” procedures which normally precede the adoption and publication of regulations and, therefore, do not have the “force and

89 Board of County Comm’rs v. Isaac, 18 F.3d 1492, 1497 (10th Cir. 1994). (“An agency’s interpretation of its own regulation is not entitled to great deference if it is based on general common law principles rather than the agency’s expertise. . . .”). See also Bambidele v. Immigration & Naturalization Service, 99 F.3d 557, 561 (3d Cir. 1996).
SUCCESSOR LIABILITY

§ 1.05

effect of law and are not accorded that weight in the adjudicatory process.”\textsuperscript{92} Such guidelines are, at most, entitled only to “some deference,” and even then, only if they represent a “permissible construction of the statute.”\textsuperscript{93} As explained above, however, SSA’s guidelines are flatly inconsistent with the plain language of the Coal Act.

In sum, SSA’s interpretation of the Coal Act as permitting it to assign miners to the “successors” or “successors in interest” of a signatory operator is entitled to no deference. SSA interpreted language which is not within its specific expertise; SSA’s interpretation is plainly inconsistent with the statute and was changed mid-stream without sufficient explanation.

§ 1.05. The Term “Successor in Interest” Should be Interpreted to Mean a Corporate Law Successor.

Unlike the Coal Act provisions concerning payments to the Combined Fund, the Coal Act provisions concerning IEP and 1992 Plan obligations contain back to back provisions regarding “successors” and “successors in interest.” In the first provision, Section 9711(g)(1),\textsuperscript{94} the Coal Act states that the term signatory operator shall include a “successor in interest.” In the second provision, Section 9711(g)(2),\textsuperscript{95} the Coal Act states that, with respect to post-enactment transactions, a “successor” may voluntarily assume a signatory operator’s obligations, but the signatory operator must remain a guarantor.

The most reasonable way to interpret the foregoing provisions is to conclude that the term “successor in interest” is something different than the term “successor,” and that the former is a narrow subset of the latter. This is most convincingly demonstrated by considering the ramification of viewing the terms as synonymous.

Construing the terms “successor” and “successor in interest” as being the same renders various statutory language meaningless surplusage. First, and most obviously, such an interpretation deprives the “in interest”

\textsuperscript{94} 26 U.S.C. § 9711(g)(1).
\textsuperscript{95} 26 U.S.C. § 9711(g)(2).
language of any meaning. Second, if the terms “successor” and “successor in interest” are viewed as synonymous, then the full range of IEP and 1992 Benefit obligations automatically apply both to a “successor” and a “successor in interest.” This interpretation, however, renders Section 9711(g)(2) mere surplusage since, on its face, Section 9711(g)(2) gives a post-enactment “successor” an option to voluntarily assume IEP and 1992 Plan obligations. In other words, if a “successor” and a “successor in interest” are one and the same under Section 9711(g)(1), then Section 9711(g)(2) is meaningless since the former already deprived the “successor” of any option to assume liability by making the assumption automatic.

It is well settled that an interpretation which renders any statutory provision meaningless, redundant, or superfluous should be avoided. For this reason, a court will “presume that the use of different terminology within a statute indicates that Congress intended to establish a different meaning.” Consequently, the more reasonable interpretation of the terms “successor” and “successor in interest” is that “successor in interest” is a narrow subset of the more generic term “successor,” i.e., that a signatory operator’s IEP and 1992 Plan obligations automatically flow as a matter of law to a “successor in interest,” but not to a “successor.”


97 National Insulation Transportation Committee v. Interstate Commerce Comm’n, 683 F.2d at 1044.

98 It is reasonable to assume that Congress intended the term “successor in interest” to be interpreted in a consistent fashion throughout the Coal Act. See Velis v. Kardanis, 949 F.2d 78, 81 (3d Cir. 1991), quoting United Savings Ass’n of Texas v. Timbers of Inwood Forest Ass’n Ltd., 484 U.S. 365, 371, (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — [either] because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”) Therefore, it follows that the rationale set forth above equally applies to the interpretation of the term “successor in interest” as it is used in the definition of related persons, 26 U.S.C. § 9701(c)(2)(A).
SUCCESSOR LIABILITY

Given this separate and distinct use of the terms “successors” and “successors in interest,” with the latter apparently being the more narrow of the two, and given the lack of any specific definition for these terms in the Coal Act itself, resort to common law successor principles is a reasonable way of ascertaining the intended meaning of these terms. Generally, under federal labor and employment laws, an asset purchaser will be deemed a successor if there is a substantial continuity between the prior business and the new business. The following factors are considered in this analysis: (1) whether the business activities of both employers are the same; (2) whether the employees of the new company perform the same jobs and have the same supervisors; (3) whether the new company produces and sells the same products to the same customers; and (4) whether there has been a significant hiatus in operations. Nevertheless, monetary liability generally will not be imposed on such a successor unless it had notice of the liability before it became a successor. Thus, if the term “successor in interest” refers to something more narrow than “successor,” it reasonably follows that a “successor in interest” must be something more narrow than a successor under traditional labor and employment law principles, such as a successor under traditional principles of state corporate law.

Under settled corporate law principles, an asset purchaser ordinarily will not be considered liable for the seller’s debts as a successor unless (1) the purchaser expressly assumes the seller’s liability, (2) the transaction amounts to a consolidation or a merger, (3) the transaction is fraudulent and designed to provide an escape from liability, or (4) the purchaser is a mere continuation of the selling company. These standards emphasize the need for a continuity in shareholders, officers, and directors between


100 Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973)(NLRA); Vucitech (Title VII); Upholsterers’ Int’l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323 (7th Cir. 1990)(ERISA).

101 United States v. Carolina Transformer Co., 978 F.2d at 832, 838 (4th Cir. 1992); Louisiana Pacific Corp., 909 F.2d 1260, 1264-65 (9th Cir. 1990); Polius v. Clark Equipment Co., 802 F.2d 75, 78 (3d Cir. 1986); Monzingo v. Correct Manufacturing Corp., 752 F.2d
the seller and the buyer. Indeed, these standards have been used in deciding whether to impose liability on asset purchasers under another federal statute — the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.102

The foregoing standards offer a rational way of defining the term “successor in interest,” as used in the Coal Act, for three reasons. First, Black’s Law Dictionary, at least one court, and the SSA (originally) defined the term “successor in interest” as one who would be considered liable for a predecessor’s debts under corporate law principles.103 Second, the Internal Revenue Service has promulgated regulations for use under the Internal Revenue Code — which includes the Coal Act — that define the term “successor in interest.” Although these definitions are not directly applicable here since they are to be used only with those particular provisions, it is noteworthy that these definitions are analogous to the general corporate law standards.104 Third, using a broader definition — such as that used to

168, 174-75 (5th Cir. 1985); Tucker v. Paxson Machine Co., 645 F.2d 620, 625-26 (8th Cir. 1981); Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977). Although some courts have begun to deviate from the traditional view of the “mere continuation” standard, in favor of a “continuity of enterprise” standard which is closer to the labor and employment law successor standards, the latter standard should not be used herein since that would tend to eliminate the distinction between “successor” and “successor in interest” Congress plainly intended.

102 See Carolina Transformer Co., 978 F.2d at 837; Asarco, 909 F.2d at 1263.

103 Black’s Law Dictionary (6th edition), defines the term “successor in interest” as “[o]ne who follows another in ownership or control of property. In order to be a ‘successor in interest,’ a party must continue to retain the same rights as original owner without change in ownership and there must be change in form only and not in substance, and transferee is not a ‘successor in interest.’ In case of corporations, the term ordinarily indicates statutory succession as, for instance, when corporation changes its name but retains same property.” Similarly, in City of New York v. Turnpike Develop. Corp., 233 N.Y. Supp.2d 887, 890 (1962), the court stated that “[i]n the case of corporations, the term “successor in interest” ordinarily indicates statutory succession . . . as, for instance, when the corporation changes its name but retains the same property.” Finally, SSA’s Transmittal No. 9 stated on page T01402.52A.1 that the term “successor in interest” ordinarily indicated statutory succession as, for instance, when one corporation changes its name but retains the same property.”

104 26 C.F.R. Section 1.367(e)-11(c)(vi)(B) provides that the term “successor in interest” refers to “(1) any domestic corporation that acquires the assets of the distributing or
define “successors” under other federal labor and employment legislation—would (1) violate settled principles of statutory construction by effectively depriving the terms “successor” and “successor in interest” of any separate meaning under the Coal Act, and (2) would be meaningless for pre-enactment situations since a central tenet of successor liability under such federal labor and employment legislation is that the purchaser knew or should have known of the liability in question. Consequently, it reasonably follows that the foregoing traditional corporate law standards for imposing successor liability on asset purchasers should be used to define the term “successors in interest” under the Coal Act. Indeed, such a conclusion is entirely consistent with and supported by the Coal Act’s purpose — as explained in Carbon Fuel — of confining Coal Act liability to the entities that benefitted from the miners’ services, since it imposes liability only on those entities that are, in essence, the same as the entity that originally benefited from the miners’ services.

§ 1.06. The Only Successor Liability Under the Coal Act Is that Imposed upon Corporate Law “Successors in Interest.”

In summary, the Coal Act’s language clearly reflects Congress’ intent to impose only limited forms of successor liability and there is no reason to deviate from that plain meaning interpretation. Based on well settled principles of statutory construction, (1) the omission of any language imposing a signatory operator’s obligations on a “successor,” coupled with language narrowly imposing only IEP and 1992 Plan obligations on a signatory operator’s “successors in interest,” and (2) the inclusion of language permitting, but not requiring, a post-enactment “successor” to assume some or all of a signatory operator’s obligations, together “strongly

controlled corporation [or a successor in interest] in a transaction in Section 381(a) to which this paragraph (c)(3)(vi) applies. See also 26 C.F.R. § 1.1503-2(c)(12)(“The term ‘successor in interest’ shall mean an acquiring corporation that succeeds to the tax attributes of an acquired corporation under the provisions of Section 381.”) Although two district court judges in the Southern District of West Virginia held that the foregoing definitions necessarily applied to the interpretation of the term “successor in interest” under the Coal Act, the court of appeals expressly declined to rule on that aspect of their decisions. See In re Leckie Smokeless Coal Co., 99 F.3d at 573, n.14.
evidences an intent not to authorize any additional remedies.”105 Indeed, the First Circuit recently endorsed this narrow view of successor liability in Eastern Enterprises.106

Further, to avoid making Congress’ careful use of separate terms — “successor” and “successor in interest” — meaningless, the latter reasonably must be interpreted as a subset of the more generic term “successor.” Therefore, the term “successor in interest” must refer to an asset purchaser that is sufficiently identified with the seller that it would be held liable for the seller’s debts under traditional corporate law principles.

Put simply, the plain meaning of the Coal Act’s language unambiguously supports the foregoing narrow view of successor liability and, under traditional rules of statutory interpretation, there is no legitimate way to broaden the specific successor liability parameters Congress chose for the Coal Act.

§ 1.07. Coal Act Successorship in Bankruptcy Sales.

Even if the provisions of the Coal Act could be interpreted as imposing successor liability upon arm’s length purchasers of assets, such liability can be avoided in a sale that occurs in bankruptcy. The Bankruptcy Code, in order to preserve the liquidity of a debtor’s assets and maximize the return to the debtor and its creditors, allows debtors to sell their assets “free and clear of any interest in . . . property of an entity other than the estate,” i.e. creditors’ interests, if certain conditions are met.107 In such sales, the bankruptcy court usually also enters a supplemental “channeling” order, providing that creditors’ claims are to be satisfied from the proceeds of sale.108 Although application of these “free and clear” provisions to

105 Northwest Airlines, 451 U.S. at 93-94.
106 Eastern Enterprises, 110 F.3d at 155.
107 11 U.S.C. § 363(f). For a discussion of the Bankruptcy Code’s goals of maximizing the value of the debtor’s assets and increasing the recovery to creditors, see 1 Bankr. Serv. L. Ed. § 1:2 at 16-17 (1994).
Coal Act successor liability implicates complex issues of tax law, bankruptcy law and jurisdiction, the result is straightforward – an arm’s length purchaser’s successor liability under the Coal Act may be cut off in a bankruptcy sale and the claims of the Combined Fund and the 1992 Plan (collectively the “Coal Funds”) may be channeled to the proceeds of sale for (presumably partial) satisfaction against the debtor’s bankruptcy estate.

Few reported cases, however, have dealt with sales free and clear of Coal Act liability. Despite the almost five years since the passage of the Coal Act and the relative frequency of bankruptcies in the coal industry, only one circuit court decision has addressed the issue: *UMWA 1992 Benefit Fund v. Leckie Smokeless Coal Co.*\(^{109}\) In that case, however, Court of Appeals for the Fourth Circuit ruled forcefully that, even if purchasers might otherwise be liable as Coal Act “successors in interest,” a bankruptcy court “could extinguish all successor liabilities arising under the Coal Act by entering a free and clear order.”\(^{110}\) As the only circuit court decision to address the issue, the *Leckie* opinion provides a useful framework for understanding sales free and clear in bankruptcy.

### § 1.08. The Leckie Decision.

In *Leckie*, two separate appeals were consolidated for decision, one arising from the bankruptcy of the Leckie Smokeless Coal Co. and its affiliates, the other from the bankruptcy of the Lady H Coal Co. and its affiliates. Both bankruptcies were so-called “liquidating Chapter 11” proceedings in which the debtors sought to sell substantially all of their assets free and clear to unrelated purchasers under Section 363(f) of the Bankruptcy Code. As both companies were “signatory operators” under the Coal Act and thus liable for Coal Act premiums, both the Coal Funds challenged the cut-off of potential Coal Act successor liability against the purchasers.

Both cases presented particularly appealing situations for allowing a sale free and clear of Coal Act claims. Both the Leckie and Lady H debtors owed more to the Coal Funds for past and future premiums than the value


\(^{110}\) *Id.*, 99 F.3d at 576.
of their assets, making a sale free and clear the only economically feasible way to sell the debtors’ assets. Moreover, although each debtor had made substantial efforts to procure bids, only one potential buyer appeared in each case, each naturally conditioning its offer on a sale free and clear of Coal Act liabilities. Thus, without a sale free and clear, the assets of Leckie and Lady H would be sold piecemeal or left to lie fallow. These facts provided the reviewing courts with a powerful illustration both of the merits of the bankruptcy policy allowing sales free and clear and the potential economic harm from unrestricted successor liability.

Perhaps influenced in part by these considerations, the two lower courts to hear the Funds’ objections to the sales rejected them, albeit on different grounds. The Leckie district court held that the Coal Act did not impose successor liability upon arm’s length purchasers of assets and then, tautologically, that such non-existent liability could, therefore, be cut off in a sale free and clear. One week later, the Lady H district court, citing stare decisis, adopted the Leckie reasoning but also found, in the alternative, that even if the Coal Act could impose successor liability upon a purchaser of assets, that liability could be cut off in a sale free and clear. This alternate ruling in Lady H formed the basis for the ruling of the Fourth Circuit Court of Appeals. Declining to reach what it saw as the broader issue of the existence of successor liability under the Coal Act itself, the court of appeals held that whether or not such liability could be imposed, it could be cut off in a sale free and clear. In reaching this

111 Id., 99 F.3d at 577.
112 Id., 99 F.3d at 577, 579. The Leckie buyer made a “free and clear” order a condition of its purchase. In Lady H, the free and clear order was requested by the debtor, as part of a motion for an auction of its assets to the highest bidder. At the subsequent auction, only one bid was received.
113 The Funds’ objections in each case were withdrawn from the jurisdiction of the bankruptcy court for decision by the district court – in both cases, the United States District Court for the Southern District of West Virginia. UMW A 1992 Ben. Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.), 201 B.R. 163 (S.D. W. Va. 1996); In re Lady H Coal Co., Inc., 199 B.R. 595 (S.D. W. Va. 1996). In Lady H, however, the district judge requested proposed findings of fact and law from the bankruptcy court and adopted them as the alternative rationale for his decision. Lady H, 199 B.R. at 598-611.
114 In re Leckie Smokeless Coal Co., 99 F.3d at 585.
conclusion, the court of appeals considered numerous arguments raised by the Coal Funds, including the following: (i) that approval of a sale free and clear of such liability was beyond the jurisdictional power of a bankruptcy court, (ii) that the Coal Funds’ right to payment of future premiums was not a current “claim” which could be addressed by the bankruptcy but, rather, a recurring tax obligation, (iii) that Coal Act liabilities were not “interests in property” which could be cut off in bankruptcy and (iv) that the cutoff of successor liability violated the policies of the Coal Act and the Bankruptcy Code.115

§ 1.09. Bankruptcy Jurisdiction over Coal Act Successor Liability.

The threshold issue for any analysis of a sale free and clear of Coal Act liability is whether a court in bankruptcy has jurisdiction to affect future Coal Act premiums. In *Leckie*, jurisdiction was questioned on the basis of the Tax Anti-Injunction Act,116 prohibiting suits “for the purpose of restraining the assessment or collection of any tax,” and the Declaratory Judgment Act,117 authorizing declaratory judgments “except with respect to Federal taxes.”118 These Acts are implicated by a sale free and clear because Coal Act premiums have been uniformly characterized as “taxes,”119 and the effect of a bankruptcy sale order is similar to that of an action for injunctive and declaratory relief. Like a declaratory judgment, a sale free and clear order effectively adjudicates a purchaser’s responsibility as a successor for future Coal Act obligations; like an injunction, the “channeling” provisions of a sale free and clear order limit creditors’ claims to the sale proceeds.

These similarities, however, are only superficial. A sale order is neither a declaratory judgment nor an injunction, but a unique proceeding

---

115 Id. at 579,580,581,586.
118 *Leckie*, 99 F.3d at 582.
specifically authorized under the Bankruptcy Code, and thus not subject to either the Tax Anti-Injunction Act or the Declaratory Judgment Act. A court issues a declaratory judgment when it adjudicates a party’s rights or obligations, without providing a coercive remedy such as injunctive or monetary relief.\textsuperscript{120} The power to issue such judgments arises not in law or equity but by statute, through the Declaratory Judgment Act, 28 U.S.C. § 2201.\textsuperscript{121} In contrast, a sale free and clear order does not merely provide a declaration of purchasers’ future liabilities and creditors’ future rights, but actively authorizes the transfer of a debtor’s assets to a purchaser while stripping off any liens or other encumbrances. Moreover, the power to issue a sale order stems not from the Declaratory Judgment Act, but from Section 363 of the Bankruptcy Code, codifying the long-recognized equitable powers of a bankruptcy court to authorize sales free of liens and encumbrances.\textsuperscript{122} Likewise, the channeling provisions of a sale free and clear order, while seemingly similar to a negative injunction prohibiting creditors from pursuing claims against purchasers, authorize, in essence, an equitable transfer of a creditor’s claim from the sale property to the proceeds.\textsuperscript{123} As such, the channeling provisions of a sale grant


\textsuperscript{121} See El Dia, Inc. v. Colon, 963 F.2d 488, 493 (1st Cir. 1992)(declaratory judgments are “statutory creatures,” not inherently equitable or legal); Moretrench Am. Corp. v. S.J. Groves & Sons Co., 839 F.2d 1284, 1286 (7th Cir. 1988).

\textsuperscript{122} For a discussion of the equitable power of a bankruptcy court to sell estate property free and clear of liens, see \textit{Van Huffel}, 284 U.S. at 227.

\textsuperscript{123} See \textit{Van Huffel}, 284 U.S. at 228 (a channeling order “transfer[s] the lien from the property to the proceeds of its sale”); Ray v. Noiseworthy, 90 U.S. 128, 136, 23 Wall 128, 136 (1874)(a channeling order “displaced” a creditor claim); \textit{cf. MacArthur Co.}, 837 F.2d at 93 (a channeling order is a separate, “corollary” proceeding to an injunction forbidding creditors from collecting from purchasers.) As \textit{MacArthur} makes clear, a bankruptcy court has the power to issue injunctions forbidding creditors from commencing collection actions against purchasers, but these are separate orders from channeling provisions, which merely give purchasers rights against the proceeds. Such explicit injunctions might implicate the Tax Anti-Injunction Act if they sought to enjoin the Coal Funds from seeking premiums from the purchasers. As explained in § 1.10[1], however, such injunctions are unnecessary, as the Coal Funds will be collaterally estopped from challenging an approved sale.
SUCCESSOR LIABILITY

creditors the same rights to the sale proceeds that they had in the original property. Channeling provisions regarding taxes, therefore, are not restraints on assessment or collection that would be barred by the Tax Anti-Injunction Act, but rather are positive grants of rights against the proceeds.

Moreover, even if sale orders could be characterized as declaratory judgments or injunctions, the Declaratory Judgment Act and Anti-Injunction Act would still be inapplicable to sales free and clear of Coal Act liability. The Supreme Court has created an exception to both Acts where a litigant has no “alternate legal way” to contest a tax.124 As expressly found by the Leckie court, because the Coal Act provides no mechanism to challenge the prospective imposition of Coal Act liability upon a third party, a debtor seeking to sell free and clear of its Coal Act obligations has no means of determining whether its Coal Act liability will be imposed upon its purchaser, other than the sale free and clear proceeding.125

In addition, one could reasonably argue that the restrictions of the Declaratory Judgment Act and the Tax Anti-Injunction Act apply only to taxes collected by the federal government, not to “taxes” imposed by quasi-private institutions like the Coal Funds.126 Finally, the Declaratory

125 Leckie, 99 F.3d at 584. Subsequent appellate courts have refused to apply South Carolina v. Regan where the party seeking to enjoin collection of a tax admits that the tax is “lawful, due and owing.” American Bicycle Ass’n v. United States (In re American Bicycle Ass’n), 895 F.2d 1277, 1280 (9th Cir. 1990); citing LaSalle Rolling Mills, Inc. v. IRS (In re LaSalle Rolling Mills, Inc.), 832 F.2d 390, 393 (7th Cir. 1987). Because the existence of successor liability under the Coal Act is at best doubtful, see §§ 1.02-1.06 above, no party to a sale free and clear need admit the legality of such liability, and the Regan exception to the Anti-Injunction and Declaratory Judgment Acts will, therefore, apply.
126 See American Bicycle, 895 F.2d at 1281 (“The manifest purpose of [the Anti-Injunction Act] is to permit the United States to assess and collect taxes alleged to be due without judicial intervention.”)(emphasis added); citing Enoch v. Williams Packing & Navigation Co., 370 U.S.1 cf. Bidart Bros. v. California Apple Comm’n, 73 F.3d 925, 928 (9th Cir. 1995)(construing the analogous State Tax Anti-Injunction Act, 28 U.S.C. § 1341, forbidding injunctions against state tax proceedings, to be inapplicable to state chartered commission).
Judgment Act permits actions “with respect to Federal taxes” if brought under Bankruptcy Code § 505(a), which gives bankruptcy courts the power to determine the “amount or legality of any tax.”\footnote{28 U.S.C 2201(a); 11 U.S.C. 505(a). Several courts have refused to assess the taxes of non-debtors under Section 505(a). See Brandt-Airflex Corp. v. Long Island Trust Co. (In re Brandt-Airflex Corp.), 843 F.2d 90, 95-96 (2d Cir. 1988); United States v. Huckabee Auto Co., 783 F.2d 1546, 1549 (11th Cir. 1986). These cases refuse to read the broad language of Section 505(a)(permitting determination of “the amount or legality of any tax”) as providing an independent grant of authority to determine non-debtor tax liability. None, however, involves sales free and clear, discussed below, the central issue in such an analysis is not these statutory terms, but the more philosophical question of the nature of Coal Act liability and whether such liability can be considered a “claim” in bankruptcy.} Although Section 505(a) is not directly implicated in a sale free and clear under Section 363(f), the section is expressly applicable to a determination of “any tax,” presumably including Coal Act taxes, and should therefore exempt such a determination from the reach of the Declaratory Judgment Act and, because the Acts are co-extensive,\footnote{Because a declaration of rights and an injunction restraining the exercise of rights are merely alternative procedural means to the same end, courts have interpreted the Anti-Injunction Act and the Declaratory Judgment Act to be “coextensive.” Perlowin v. Sassi, 711 F.2d 910, 911 (9th Cir. 1983). See Leckie, 99 F.3d at 583. Thus, what is barred by one Act must be barred by the other.} from the Anti-Injunction Act as well.

§ 1.10. Future Coal Act Premiums as Current Bankruptcy “Claims” or as Recurring Taxes.

After establishing jurisdiction to consider a sale free and clear of Coal Act liability, analysis must turn to the substantive requirements for such a sale. Although the Bankruptcy Code sets out a statutory mechanism for determining which interests in property may be subject to a sale free and clear, discussed below, the central issue in such an analysis is not these statutory terms, but the more philosophical question of the nature of Coal Act liability and whether such liability can be considered a “claim” in bankruptcy.

The notion of a creditor’s “claim” is perhaps the central concept of the Bankruptcy Code. A “claim” not only establishes a creditor’s right to receive payment out of the bankruptcy estate and vote on a plan of reorganization in Chapter 11, but also subjects the creditor to a bankruptcy court’s power to extinguish obligations through discharge or sale free and clear. If future Coal Act premiums are current “claims” in bankruptcy, then they will be subject to the power of a court in bankruptcy and, under the provisions governing sales free and clear, may be prevented from being imposed through successor liability onto a purchaser. However, if such future premiums are not current claims, then they are beyond the power of bankruptcy proceedings.

The definition of a claim under the Bankruptcy Code is so expansive as to seem almost infinite:

(A) right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is right is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

In practice, however, despite the admonitions of Congress and the Supreme Court to give a claim the “broadest possible” definition, courts

---

129 11 U.S.C. §§ 506, 1129 (only claims are entitled to bankruptcy payment), 1126 (creditors with claims permitted to vote on a reorganization plan).
130 11 U.S.C. §§ 363 (sale free and clear), 727, 1141 (discharge).
133 See In re Wolverine Radio Co., 930 F.2d 1132, 1137-45 (6th Cir. 1991)(holding state’s ability to use debtor’s unemployment history to calculate successor’s unemployment tax was not a claim, in part, because it did not give the state a right to payment); In re Villarie, 648 F.2d 810, 812 (2d Cir. 1981)(holding civil service retirement agency’s right to recoup an employee’s loan from future retirement benefits was not a claim because
have considered some obligations so remote as to be beyond the outer boundaries of a claim. For example, where an obligation cannot be classified as a right to payment, no claim will be found to exist. Similarly, where there is no notice of a potential claim, as in tort cases where injury is as yet undiscovered, courts have been unwilling to find such potential tort victims to possess claims.


Most pertinent for our analysis, courts have also been unwilling to find a claim where a right to payment arises entirely in the future. For

under state law the agency would never have a right to sue for payment, but could only offset the loan against future benefits).

134 See, e.g., Mooney Aircraft v. Foster (In re Mooney Aircraft, Inc.), 730 F.2d 367, 375 (5th Cir. 1984). The extensive literature and case law discussing the scope of a bankruptcy “claim” focus almost exclusively on the issues raised in environmental and tort cases where the identity and existence of a potential claim or claimant may not be known until years after bankruptcy. The central issues in such cases – when a claimant first has a “relationship” with a debtor or when a claim can first be “identified” – are irrelevant to cases involving Coal Act premiums. Because the claimant Coal Funds are active and unrelenting participants in any coal industry bankruptcy, the only question in these cases is when does the existing relationship between the Funds and the debtor coal company ripen into a “right to payment” that can be considered as a bankruptcy claim.

One happy consequence of the Coal Funds’ participation in such bankruptcy proceedings is that they will be bound by the terms of any sale free and clear. Although some recent cases in the Seventh Circuit Court of Appeals have suggested that the free and clear provisions of a sale order might be unenforceable against successor liability claims brought after the termination of bankruptcy proceedings, Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Tasemkin, Inc., 59 F.3d 48 (7th Cir. 1996); Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159 (7th Cir. 1994), the Seventh Circuit expressly noted that successor liability, as an equitable doctrine, may be unavailable where a claimant had a prior opportunity to satisfy a claim in bankruptcy. Tasemkin at 51; Zerand-Bernal at 163. Moreover, if the Coal Funds participated in the bankruptcy proceeding that ordered a sale free and clear of their successor liability claims, they will be collaterally estopped from asserting such liability in any subsequent proceeding. See Federated Dep’t Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981)(“[T]hose who have contested an issue shall be bound by the result of the contest” under res judicata)(citation omitted).


136 In LTV, the debtor was in bankruptcy when the Coal Act was passed. Contending that its new obligations to the Coal Funds were merely a continuation of its pre-bankruptcy
example, in *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, the Second Circuit Court of Appeals found that no claim for Coal Act premiums could have existed before the enactment of the Coal Act. Although the statute imposes liability upon “signatory operators” because of their participation in collective bargaining agreements dating back to 1948, this “nexus” to past actions was insufficient to give the Coal Funds even a “contingent” or “unmatured” right to payment before passage of the Coal Act. Before the Coal Act, a claim for Coal Act premiums “simply did not exist . . . [W]here the statute imposing the liability has not been enacted, it would be impossible to find even the remotest ‘right to payment.’” Similarly, in *River Place East Housing Corp. v. Rosenfeld (In re Rosenfeld)*, a debtor’s easement obligation for condominium fees was held to be outside the definition of a claim and thus non-dischargeable because the fees “arose from continued post-petition ownership of the property” and paid for contemporaneous upkeep and expenses. Because the court considered the right to condominium fees to arise entirely anew each year to pay for each year’s expenses, there was never a present right, even a contingent or unmatured right, to the payment of future condominium fees and, thus, there was no present claim for those future fees that could be discharged in bankruptcy.

Superficially, future Coal Act premiums might also appear to arise from a recurring right to payment that would prevent them from being classified as current claims. Like the condominium fees in *Rosenfeld* or future real estate taxes on a particular piece of property, Coal Act premiums obligations under its UMWA collective bargaining agreement, the debtor argued that the Funds’ rights to premiums were claims arising prior to bankruptcy which should be barred because the Funds had not filed a timely proof of their claims. Holding that the Coal Act was an entirely new statutory obligation and not a mere extension of a private contract, the Second Circuit found the Coal Act premiums to be post-petition claims. *Id.* 53 F.3d at 497.

137 *Id.*

138 154 B.R. at 419.

139 *River Place East Housing Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833, 837 (4th Cir. 1994).

140 *Id.* at 837.

141 *Id.*

142 See 26 U.S.C. §§ 9704(a), 9712(c)-(d).
are calculated and assessed annually. Each annual premium might be viewed as a new right to payment on the part of the Funds and thus as a new claim. If so, premiums not yet assessed and owing would not yet be claims in bankruptcy and would be beyond the power of a bankruptcy court to affect, whether by a sale free and clear or otherwise.


Supporting the characterization of the Coal Act premiums as recurring rights to payment is their status as taxes. Most taxes are like the condominium fees in *Rosenfeld*; no right to payment exists until the occurrence of the taxable event that triggers them. Thus, bankruptcy usually leaves unchanged any tax obligations that will come due in the future. No individual debtor, for example, is discharged from the obligation to pay income taxes based upon future income; nor can a debtor’s property be sold free and clear of the state’s right to collect its property tax from the new owner.

Obligations under the Coal Act, however, are not like most other taxes. As was recognized in the *Leckie* decision, unlike recurring income or property tax obligations or the condominium fees in *Rosenfeld*, Coal Act

143 One court, the Second Circuit in *LTV*, arguably accepted this characterization of the Coal Act. At issue in the *LTV* opinion was the payment priority to give Coal Act premiums that came due during the pending bankruptcy. The court held such premiums to be “taxes incurred by the estate,” entitled to priority as administrative claims. *Id.*, 53 F.3d at 498. In the final sentence of its discussion, the Second Circuit further added that “the remainder of LTV’s obligations,” *i.e.* its obligations for Coal Act premiums not yet accrued, would not be discharged in bankruptcy, but would remain an “obligation of the reorganized LTV.” *Id.* In making this comment, the Second Circuit, by necessary implication, must have thought these future premiums were not yet current claims. Were these future premiums current claims, they would be discharged upon confirmation of the LTV debtor’s plan of reorganization and could not be asserted against the reorganized LTV. *See* 11 U.S.C. § 1141(d)(1)(all claims in existence against a Chapter 11 debtor are discharged when its plan of reorganization is confirmed (absent an explicit statutory exception)). The court’s reasons for this implied finding are obscure: the Second Circuit supplied no reasoning for its observation and the issue of dischargeability was never discussed by the district court below. *See* LTV Steel Co. v. Shalala (*In re Chateaugay Corp.*), 154 B.R. 416 (S.D.N.Y. 1993). As such, the court’s statement is pure dicta.

144 *See* § 1.09.
premiums are not triggered by the occurrence of specific events during a given period with respect to a particular taxpayer. While liability for income or property taxes depends upon a taxpayer incurring income or owning property in a given tax year, liability under the Coal Act is fixed and permanent once a company is assigned beneficiaries.145 Thus, rather than being analogous to other taxes, Coal Act premiums are best viewed as a form of statutory annuity. Through the Coal Act, Congress, in effect, replaced the prior contractual, collectively bargained obligations of coal companies to fund union retiree health benefit trusts with a new statutory obligation to pay Coal Act premiums to the Coal Funds.146 Like a contractual agreement to pay benefits, the Coal Act gives to beneficiaries (through the intermediary Coal Funds) the right to a stream of payments arising out of a single obligation incurred not by contract, but by the assignment of beneficiaries under the Act.147 Coal Act premiums are, thus, the monthly installments due on a pre-existing right to payment and as such constitute a single claim in bankruptcy, subject to the powers of the Bankruptcy Code, including the power to sell free and clear.

§ 1.11. Bankruptcy Sales Free and Clear of Interests in Property.

Once Coal Act obligations are determined to be a claim, the mechanics for allowing sales free and clear are relatively straight-forward, although in practice they have proved difficult to apply. They involve, first, a

145 See Leckie at 581 n.9 (“a coal operator remains liable for . . . premiums, even if it chooses to cease coal mining operations and to take up an entirely different enterprise”); 26 U.S.C. § 9706(a)(beneficiaries are assigned to signatory operators that “remain in business.”)(§ 9701(c)(7)(defining “in business” as being engaged in any business activity “whether or not in the coal industry.”)).
146 See generally Carbon Fuel Co., 100 F.3d at 1133; LTV, 53 F.3d at 497.
147 Cf. In re Stewart Foods, Inc., 64 F.3d 141 (4th Cir. 1995)(holding a corporation’s contract to pay a yearly sum for 10 years as severance to a retired executive was a single claim in bankruptcy).
determination that the statutory conditions of Section 365(b) have been satisfied and, second, that the case law safeguards for bankruptcy sales have been met.


Section 363(f) of the Bankruptcy Code provides:

The [debtor in possession] may sell property under subsection (b) . . . of this section [giving requirements for notice and hearing] free and clear of any interest in such property of an entity other than the estate, only if:

1. applicable nonbankruptcy law permits sale of such property free and clear of such interest;

2. such entity consents;

3. such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property.

4. such interest is in bona fide dispute; or

5. such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. 148

The five enumerated requirements are disjunctive; if the proposed sale of an “interest in property” satisfies any one of them, the sale can proceed free and clear of such interest.

The scope of an “interest in property,” however, is unclear. The term is never defined in the Bankruptcy Code and the resulting uncertainty has led to a sharp, although not evenly divided, split among the courts that have

considered the issue. The majority of courts, including the Leckie court, have interpreted the term expansively and found an interest in property to exist when a creditor has a right to seek a future money payment from the debtor.\textsuperscript{149} Others have narrowly interpreted an interest in property to mean only \textit{in rem} interests.\textsuperscript{150} The better reasoned interpretation is the former. Although the term “interest in property” superficially might be taken to encompass only claims that can be asserted \textit{in rem} against the transferred property (such as claims secured by a lien or other security interest) as opposed to those enforceable against the purchaser \textit{in personam}, (like successor liability claims), such a reading would invert the priority scheme of the Bankruptcy Code by allowing sales free and clear of secured interests but not unsecured \textit{in personam} claims. Moreover, restricting “interest in property” to \textit{in rem} claims ignores the fact that \textit{in personam} claims may be interests in property when they arise from an equitable servitude or easement.\textsuperscript{151} Successor liability, as an \textit{in personam} obligation imposed solely through the ownership of property, may be considered a type of servitude and thus as an “interest in property” for a sale free and clear under Bankruptcy Code Section 363(f).\textsuperscript{152}

If they constitute an “interest in property,” then Coal Act claims will be cut off in a sale free and clear if one of the five enumerated conditions

\begin{itemize}
\item product liability claims can be an interest in property); Forde v. Kee-Lox Mfg. Co., 437 F. Supp. 631 (W.D.N.Y. 1977), \textit{aff’d on other grounds}, 584 F.2d 4 (2d Cir. 1978)(liability for a civil rights claim may be an interest in property).
\item One example would be the condominium fees at issue in \textit{In re Rosenfeld}, discussed above at §1.09[2].
\item The district court in \textit{Leckie}, 201 B.R. at 172-73, upheld a sale free and clear of Coal Act liability under Section 363(f)(1), first holding (correctly) that successor liability did not exist for an arm’s length purchaser under the Coal Act and then, somewhat redundantly, holding that this lack of successor liability meant “applicable non-bankruptcy law” allowed a sale free and clear.
\end{itemize}
in Section 363(f) can be satisfied. Usually, the only condition at issue is Section 363(f)(5), which allows a sale free and clear of an interest if the creditor “could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.” Most recent decisions have interpreted Section 363(f)(5) as not requiring actual satisfaction, but only a finding that the claim could hypothetically be satisfied by a money payment. As an obligation under the Coal Act can be satisfied by the payment of money, a sale free and clear under Section 363(f)(5) is permissible.


In addition to the statutory requirements of Section 363, courts have imposed judicial prerequisites to prevent abuse of the sale procedures. To obtain approval of a sale free and clear of substantially all a debtor’s assets, a debtor has the burden of showing that “a sound business purpose dictates such action.” The elements of this showing are that “(1) a sound business reason or emergency justifies a pre-confirmation sale; (2) the sale has been proposed in good faith; (3) adequate and reasonable notice of the sale has been provided to interested parties; and (4) the purchase price is fair and reasonable.” This required showing of good faith serves the same purpose, and should be as easily satisfied, as the provisions in the Coal Act preventing sham transactions.


---

155 Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983); see also Stephens Industries, Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986).
157 26 U.S.C. § 9722 (voiding the effect of any transaction whose purpose is to “evade or avoid” Coal Act liability).
Allowing sales free and clear of Coal Act successor liability accords with the purposes of both the Bankruptcy Code and the Coal Act. The purpose of the Bankruptcy Code is to provide an orderly and efficient means for insolvent debtors to either liquidate or, if possible, reorganize while providing adequate protection for creditors. The purpose of the Coal Act, zealously guarded by the Coal Funds, is to assure adequate “provision and funding” of health care for retired union coal miners.158


Because property sold subject to a creditor’s interest is worth less than that sold free and clear, sales free and clear generate more proceeds for the bankruptcy estate with which to (at least partially) satisfy all of a debtor’s creditors. Thus, by explicitly authorizing sales free and clear, Congress made a general policy decision to subordinate the interests of those unsecured creditors with a specific right of recourse against a debtor’s property to the general interests of all creditors. Neither the Bankruptcy Code nor the Coal Act contains any provisions exempting the Coal Act from that policy choice.

Moreover, in many cases a sale free and clear will maximize the amount of money received by the Coal Funds. In many coal company bankruptcies, the alternative to a sale free and clear is not a sale subject to Coal Act successor liabilities, but no sale at all. For example, in the two bankruptcies involved in the Leckie appeal, the value of the debtors’ assets was far less than the present value of the debtors’ liabilities to the Coal Funds. Absent a sale free and clear, both debtors’ assets would likely have been unsaleable except in a piecemeal liquidation, most likely at fire sale prices. In such liquidations, the Coal Funds would receive far less than they would from a comprehensive sale of assets subject to a sale free and clear. Indeed, in the two cases consolidated in Leckie, both district courts expressly found that the sales free and clear at issue there would

158 Public Law 102-486 § 19142.
159 Leckie, 201 B.R. at 174 (if the sale is approved, “funds will be generated from which to pay some of Defendants’ debts, including their past due Coal Act obligations. If the sale does not go through, no one will be in a position to contribute Defendants’ future obligations to the Funds . . . .”); Lady H. 199 B.R. at 598 (the purpose of the sale was “to obtain the maximum return for all creditors, including the objecting creditors,” [the Coal Funds].)
maximize recovery to all creditors, including the Coal Funds.\textsuperscript{159} Sales free and clear of Coal Act successor liability, far from contravening the legislative purposes behind the Coal Act, fulfill those purposes, providing maximum recovery for the Coal Funds while ensuring an orderly liquidation for the unfortunate debtor.


While allowing sales free and clear of Coal Act successor liability perfectly accords with congressional policy behind the Coal Act, the necessary implications of the legal reasoning permitting such sales may extend to a more problematic result – allowing the discharge of Coal Act obligations in bankruptcy reorganizations. As discussed above at §1.10, in order to be subject to a sale free and clear, future Coal Act premiums must be claims in bankruptcy. Once defined as a “claim” for purposes of a sale free and clear, however, such future premiums will subject to all other provisions of the Code governing claims, including those allowing discharge upon confirmation of a reorganization plan.\textsuperscript{160} The Bankruptcy Code gives only one definition of a claim and there is no principled way of allowing an obligation to be a claim for some purposes but not for others.\textsuperscript{161}

Although, as set forth above at § 1.10[3] and as found by the Leckie court, future Coal Act premiums must logically be classified as claims in bankruptcy, courts may be reluctant to follow this logic in the context of discharge. A discharge case can be depicted in highly unsympathetic terms as an attempt by a coal company to “dump” its responsibility for retiree health benefits under the Act and continue business, which, the Coal Funds will argue, is exactly the same conduct that led to the funding “crisis” the Coal Act was designed to prevent. Sale cases, in contrast, have much

\textsuperscript{160} See 11 U.S.C. § 1141(c).
\textsuperscript{161} This has not prevented courts from nonetheless reserving the issue whether such a distinction may exist. See Grady v. A.H. Robins Co., 839 F.2d 198, 203 (4th Cir.), \textit{cert. dismissed sub nom.}, Joynes v. A.H. Robins Co., 487 U.S. 1260 (1988)(holding tort claimants possessed a “claim” for purposes of being subject to the automatic stay, but explicitly declining to decide whether that claim would be dischargeable upon termination of bankruptcy).
more favorable facts because the selling debtor remains liable for its obligations under the Act. These emotional arguments may overwhelm logic and persuade courts presented with a discharge case to find Coal Act premiums outside the definition of a claim. However, it is worth noting that the recent Supreme Court admonitions to adhere to the “plain meaning” of a statute suggest that, if subjected to Supreme Court review, such decisions would likely be reversed. For example, the Supreme Court brusquely overruled lower court attempts to exempt collective bargaining agreements from being rejected in bankruptcy on equitable and public policy grounds. 162 It is also worth noting that this decision was quickly reversed by Congressional amendments to the Bankruptcy Code. 163 Given the current legislative activity involving attempts to amend the Coal Act, it is quite possible that any Supreme Court ruling allowing discharge would be similarly reversed by statute.