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Person or Property? On the Legal Nature of the Bankruptcy Estate

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Recommended Citation

10 BANKR. DEV. J. 465 (1994)

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Person Or Property? On The Legal Nature Of The Bankruptcy Estate

10 Emory Bankruptcy Developments Journal 465 1994

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This article addresses the issue of the legal nature of the bankruptcy estate: whether the bankruptcy estate is a collection of property interests, like the traditional conception of a decedent's estate, 1 or whether the estate is the legal person in which such property interests vest, analogous to a corporation, a partnership, or an individual. The legal nature of the bankruptcy estate becomes most important when a corporation which files a chapter 11 petition becomes a debtor in possession. Suppose Acme Corporation files a chapter 11 bankruptcy petition and becomes a debtor in possession; Acme's property becomes the bankruptcy estate. What is Acme Corporation's current relationship to its property? Under what I will call the "property view," 2 that property remains vested in Acme Corporation, a corporation in bankruptcy, with Acme subject to new rights and obligations as a debtor in possession. Under what I will call the "new person view," the commencement of the bankruptcy case (1) creates a new legal person, the Acme Estate, (2) causes Acme Corporation's property to be transferred from Acme Corporation to the Acme Estate, and (3) places Acme Corporation, the debtor in possession, as representative of the Acme Estate.

The new person view is actually a new variant of a rather metaphysical legal doctrine, the "new entity" view. 3 Under that view, when Acme Corporation goes into bankruptcy, the filing does not create a new legal person in the form of Acme Estate. Rather, as under the property view, the property of the estate remains vested in Acme Corporation. Acme

[*466] Corporation itself, however, is considered a new legal person. That is, the pre-bankruptcy legal person that was Acme Corporation no longer exists, but is instantly reincarnated in the form of Acme Corporation, debtor in possession. Although Acme Corporation, debtor in possession, has exactly the same officers, directors, and by-laws as the old Acme Corporation, it is considered a new and distinct legal entity, not subject to the obligations of the old Acme Corporation. This type of analysis makes it easy to answer many questions regarding the debtor in possession's rights and obligations during bankruptcy. The new entity view, however, became questionable after the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*. 4 *Bildisco & Bildisco*, a general partnership that was party to a collective bargaining agreement, had filed for bankruptcy. *Bildisco & Bildisco*, now debtor in possession, argued that it was a new legal entity with no responsibilities under a collective bargaining agreement signed by the old *Bildisco & Bildisco*. 5 The Court rejected this view, holding that, at least for the purpose of the labor laws, the debtor and the debtor in possession were the same entity. 6

Despite the holding in *Bildisco*, confusion remained regarding the viability of the new entity theory, and some courts continued to hold that the debtor and the debtor in possession are separate legal entities. 7 Courts either ignored the applicability of *Bildisco* 8 or regarded *Bildisco* as addressing [*467] the

issue narrowly. 9 In addition, other courts acknowledged that under Bildisco the debtor and the debtor in possession are the same entity, but nevertheless held that they are also different. 10 The court in *Mohawk Industries v. United States* (*In re Mohawk Industries*) 11 held that the debtor was "sufficiently distinct from its former self" 12 such that it is now a different entity for the purposes of set off rights. Other courts have written that a debtor is "to some extent a new entity," 13 or that there is "a definite cleavage which separates the two upon the filing of a bankruptcy petition." 14 These court decisions provide a rather vague and unsatisfactory basis for the bankruptcy law analysis. 15

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The new person view developed as an attempt to provide a clearer basis for retaining the effects, if not the form, of the new entity view. The new person view recognizes that the debtor in possession is the same entity as the debtor, as Bildisco indicates. But the new person view sees the debtor in possession as simply acting on behalf of a new legal person in which the property of the bankruptcy estate vests. As such, the debtor in possession is itself not a new entity, but it acts on behalf of a new entity. Moreover, all the property of the old entity transfers to the new entity. Instead of the debtor in possession becoming a new entity distinct from the debtor, the debtor in possession becomes the representative of a new entity that possesses all the debtor's property. Such a view can reach the same results as the new entity view, while arguably not conflicting with Bildisco. 16

The legal nature of the bankruptcy estate is not an idle question of juridical taxonomy. Nor do I intend to analyze the issue simply by attempting to decide which of the legal forms seems a closer fit. Rather, the choice of approach significantly affects how one would analyze many questions that might arise in the Acme bankruptcy. It is with reference to

[*469] the effect on such analysis that I will concentrate. The Bankruptcy Code 17 addresses many issues about the rights and obligations of persons both corporal and corporate who have an interest in the Acme bankruptcy, but it also leaves open a number of issues. If Acme Corporation was party to several contracts, is Acme Corporation still a party to the contracts or is Acme Estate? If the debtor in possession exercises the power of a trustee to reject one of the contracts, does the contract terminate or does it revert to Acme Corporation? Can the debtor in possession, or a trustee, if one is appointed, exercise Acme's corporate powers, such as the power to waive Acme's attorney-client privilege about pre-bankruptcy communications or the power of Acme's corporate officers to perform acts within their powers? What are the fiduciary duties of the officers and directors of Acme Corporation and to whom do they run? Corporate governance issues may also arise; can the shareholders of Acme hold an election of directors? Each of these questions is cast in a different light, depending on whether we follow the property view and regard Acme Corporation as remaining in possession of its property, although subject to new rights and obligations in dealing with that property, or if we follow the new person view and regard Acme Corporation as acting on behalf of a new legal person, the Acme Estate, to which Acme Corporation's property is transferred.

The issue of the legal nature of the bankruptcy estate arises primarily to fill two types of gaps: where the Code has not spoken specifically or is susceptible to more than one interpretation, and where nonbankruptcy issues are addressed in bankruptcy court. Issues like those discussed in the previous paragraph fall into both categories. The new person view and the property view lead to a difference in the basic approach to filling these gaps.

The new person view provides an apparently short, clearcut answer

[*470] to certain legal questions; the estate is a new legal person distinct from the debtor, so it is neither bound nor directly affected by the rights and obligations of the debtor. Such is the easy solution the new person view reaches on questions involving the debtor's contracts, corporate powers, or corporate governance. Some courts have often used the new entity or new person view as such a short-cut, while the better approach would be to confront directly the application of the specific relevant bankruptcy or nonbankruptcy law. 18 The potential for manipulation alone is a reason to reject the new person view. 19

In this article, however, I will address the more sophisticated uses of the new person view, which use it not just as a shortcut, but rather as a basis for developed analyses of legal doctrine in areas like executory contracts and corporate governance, and even for an overall theory of bankruptcy law. I will argue that the new person view introduces disruptive complications into bankruptcy analysis and tends to distort the rights and obligations of both the debtor and those with an interest in the debtor, such as creditors, shareholders, and contracting parties. The new person view, if fully developed, ends the analysis of many issues in bankruptcy

[*471] law very quickly, when often a more detailed interpretation of the relevant Code provision or other rule is necessary. 20

Part I examines relevant provisions of the Code and the tax laws, and concludes that the statutory support for the new person view is, at best, ambiguous. Some provisions in the Code may seem to support the new person view if read individually, but when read in context, they do not. Furthermore, other Code provisions invalidate use of the new person theory as well. Moreover, the new person view would render some parts of the Code redundant. The tax laws also prove more consistent with the property view than the new person view.

Part II discusses executory contracts, the area of bankruptcy law in which the new person view, and its predecessor, the new entity view, developed. 21 Although the new entity view at one time arguably supplied a necessary rationale for the executory contract doctrine, it is no longer necessary. Rather than supplying a basis for analysis, it now introduces a number of unnecessary and unhelpful complications into the analysis.

Part III examines the effects of the new person view on analysis of corporate governance issues and the appropriate use of the corporate powers of the debtor during bankruptcy. The new person view creates an unnecessary division between the debtor and the debtor's property, distorting the rights and obligations of both the debtor and those with an interest in the debtor. The bankruptcy process affects the entire corporation, not just its property. Because the new person view simply creates a new legal person to take over the debtor's property, it fails to account for this occurrence. Effective reorganization or liquidation of the debtor will implicate not only its property, but also the corporate structure, powers, and governance.

Part IV turns from doctrinal analysis to legal theory and discusses

[*472] whether the new person view is necessary for a noneconomic theory of bankruptcy. The leading theory of bankruptcy is based on an economic model, and is consistent with the property view. The leading noneconomic theory of bankruptcy relies in part on the new person view. I will argue, however, that the new person view is not a necessary part of the noneconomic theory, and that such a theory could be broader in scope if it used the property approach.

I. STATUTORY AUTHORITY

There are two types of statutory provisions most pertinent to the legal nature of the bankruptcy estate. First, although the Code does not address the legal nature of the estate directly, it includes several provisions that spell out basic characteristics of the estate and the trustee or the debtor in possession. 22 Second, a number of statutory provisions govern the tax consequences of a bankruptcy filing and the various events that may occur during the bankruptcy; many of the provisions appear in the Code itself, 23 and others which appear in the Internal Revenue Code, 24 were passed with bankruptcy specifically in mind. 25 Tax law regularly deals with the type of questions at issue when deciding the legal nature of an entity, specifically, are entities separate and what sort of legal entities are they? 26 As a result, the tax provisions are quite illuminating on the issue.

A. Bankruptcy Code Provisions

The new person view would require reading too deeply into a few provisions of the Code and dismissing some other provisions. The Bankruptcy Act, 27 predecessor to the Code, treated the bankruptcy estate as a collection of property interests. 28 Commencement of a bankruptcy did not create an estate as a new and separate legal person; rather, the debtor's property which constituted the bankruptcy estate vested in the bankruptcy

[*473] trustee. 29 If the debtor remained in possession, the property of the bankruptcy estate was vested in the debtor, although the debtor now held such property subject to the limits in the Act and the control of the court. 30

The commencement of a case under the Code creates an estate comprised of certain property interests. 31 Under the property view, the Code would keep the same basic approach as the Bankruptcy Act, perhaps even a simpler one. If the debtor remains in possession, whether a corporation or an individual, the property remains vested in the debtor. If a trustee is appointed in a corporate bankruptcy, the property remains vested in the debtor corporation, and the trustee largely displaces the officers and directors of the debtor. Only in an individual bankruptcy where a trustee is appointed will the debtor be divested of the estate property, which vests in the trustee.

According to the new person view, the Code creates another legal person, namely an estate encompassing the property interests formerly of the debtor and becoming the legal person in which such property interests vest. The commencement of the bankruptcy case would divest the debtor of its property, but would not vest that property in the trustee, as it did under the Bankruptcy Act. Rather, the property would vest in the estate itself. "Property of the estate," a phrase which appears throughout the Code, 32 would then refer not only to such property as making up the estate, but also as being vested in the estate as a legal person. When the debtor remains in possession, the debtor's property is not vested in the debtor. Instead, the debtor in possession acts as an agent for the newly created person: the estate.

Such a structure is not spelled out in the Code; rather, it would have

[*474] to be inferred from several sections of the Code. 33 The statutory argument for the new person view runs along the following lines: Section 541 provides that the commencement of a bankruptcy case "creates an estate." 34 Section 323 provides that the trustee is "the representative of the estate." 35 Thus, the trustee, rather than being the person in whom the property of the

estate vests, now is simply the representative of the estate; that is, an agent of the estate similar to an officer of a corporation. 36 Similarly, if the debtor remains in possession, the estate property would not remain vested in the debtor, but rather the debtor would act as the representative of the estate, which is an entirely separate legal entity. 37 Accordingly, the debtor's relationship to the estate is that of transferor and transferee. 38

Read in isolation, such provisions seem consistent with the new person view. But a number of difficulties arise if the provisions are read in light of the Code as a whole and according to the construction of such terms under the Bankruptcy Act. Such a reading would support an interpretation requiring far less a change in bankruptcy law than the extravagant reading required by the new person view. For example, section 541, which states that commencement of the case creates an estate, further provides that the "estate is comprised of all the following property . . .," 39 making the estate simply a collection of property interests. It also highlights the fact that neither section 541 nor any other Code section provides that the commencement of the case either divests the debtor of property or vests the property in the estate. The Code, however, does continue the use of the Bankruptcy Act term, "debtor in possession," which the Code concisely [*475] defines as "the debtor." 40 This implies continuation of the approach taken by the Bankruptcy Act, under which the property that constituted the estate was vested in the debtor as debtor in possession. 41 Thus, the debtor in possession is simply the debtor, still in possession of its prebankruptcy property, but now vested with the rights and duties of the trustee.

Similarly, the trustee's status as "representative of the estate" 42 is subject to a more modest reading than inferring that the Code departs from the structure under the Bankruptcy Act making the trustee an agent of the estate. Rather, the term could be used to refer to the executor or administrator of a decedent's estate. 43 Indeed, courts, including the Supreme Court, on occasion have referred to a bankruptcy trustee as the "representative of the estate," long before the Code was enacted. 44 This again indicates that no great innovation appears in the Code.

The definitions in the Code also differentiate an estate from a legal person. The definition of "person" includes individuals, partnerships, and corporations. 45 The broader definition of "entity" includes persons, estates, and trusts. 46 Thus, the Code's definition of "person" includes the sort of legal entities that are usually viewed as persons but not the sort of entities that usually consist simply of property interests. 47 Thus, a bankruptcy estate, like a decedent's estate, is simply a collection of property interests.

The new person view seeks further support in the provisions that a dismissal of the case "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case" 48 and that confirmation "vests all the property of the estate in the debtor." 49 The argument is that such provisions would be unnecessary

[*476] if the property were not vested in the estate rather than the debtor. Such a view has three problems. First, the provision vesting the property of the estate upon confirmation serves to give effect to section 1123(a)(5)(A), which states that a plan may provide for "retention by the debtor of all or any part of the property of the estate." 50 If the property interests had been transferred to the estate, then the debtor would have nothing to retain; rather, a transfer back to the debtor would be required. Second, the provisions seem more likely to reflect the view that the estate property, although vested in the debtor, is vested in the debtor as debtor in possession. Under such a view, which existed under the Bankruptcy Act, 51 if the case is dismissed or a plan of

reorganization confirmed, then the estate property revested in the debtor in the debtor's own right. 52

Finally, even if the provisions are interpreted to mean that the property of the estate was not vested in the debtor during the bankruptcy, this would not mean that they were vested in the estate. Rather, the drafters of those particular provisions were more likely operating under the prevailing view of the Bankruptcy Act that the property of the estate vested in the trustee or remained vested in the debtor in possession if no trustee were appointed. 53

Furthermore, if one adopts the new person view, the language in section 553 of the Code, 54 designed to separate particular pre-petition and post-petition property rights, would be redundant. Section 553 limits setoff rights to those that arose before the petition was filed. A basic requirement of set-off is mutuality. One can only set off obligations to a person if one has enforceable rights against the same person. 55 If A owes me money, I can set that debt off against my debt to A, but I cannot use that as a reason not to pay my debt to B. If the estate and the debtor were separate legal persons, there would be no mutuality and thus no question of setting off post-petition rights. A creditor could not set off obligations of the debtor against property of the estate in the hands of the creditor. 56

[*477] Thus, the limitation in section 553 to pre-petition debts would be nugatory. 57

The drafting and enactment of the Code was a hurried and slightly disorganized process which resulted in ambiguities, redundancies, and inconsistencies in the statute. 58 It is not surprising, then, that the statute does not clearly define the legal nature of the bankruptcy estate. Indeed, legislative history can be used to support either view. 59 The new person view, however, represents a radical change in the structure of bankruptcy

[*478] law. Thus, its acceptance should require more than an ambiguous, rather strained interpretation of the Code. More important, such equivocal statutory support should not overcome the doctrinal and theoretical weakness of the approach. 60

B. Bankruptcy Tax Provisions

The statutory provisions governing the taxation aspects of bankruptcy cases are instructive on the nature of the bankruptcy estate. The question of whether the estate is a new legal person to whom the property of the debtor is transferred reflects two basic issues of tax law: the characterization of legal entities and the determination of whether a taxable disposition of property has occurred. 61

If the commencement of a corporate bankruptcy created a new legal person and transferred the corporation's property to the new legal person, normal corporate taxation rules would impose a number of consequences. 62 The new entity would begin existence as a separate taxable entity. The transfer of the property would be a disposition of the property, which would trigger realization of gains or losses, unless the disposition fit into specific nonrealization provisions. 63 The corporation would determine whether it had a taxable gain or loss with respect to each piece of property by subtracting its basis in the property from what it received for the property. 64 When the estate itself disposed of the property, then its gains or losses would similarly depend on its basis and the amount it received in exchange for the property. 65

If the corporation and the estate were treated as separate entities, as the new person view dictates, then the tax attributes of the corporation would be separate from the tax attributes of the estate. A corporation may have accumulated net losses, capital gains losses, or tax credits from previous [*479] years which it may use to offset its present tax liability. 66 While the corporation could not transfer these favorable tax attributes to another corporation, they do get transferred from the debtor corporation to the corporation after reorganization. 67

Another tax consequence occurring as a result of the new person theory is the realization of income by the creditors and shareholders upon transfer of the property from the corporation to the estate. Take as an example a creditor holding a bond issued by the corporation. Upon the commencement of the bankruptcy, this creditor would still have the bond, but the corporation would no longer have any assets because all of its property was transferred to the estate. The creditor, however, may now also have a claim, with some possible value, against the newly created person, the estate. 68 A shareholder of a debtor corporation would be in a similar situation. The shareholders would hold a potentially fruitful property interest because of the possibility that the corporation could be successfully reorganized, enhancing the value of their interests. Thus, the creditor and shareholder would have effectively disposed of their bond and stock in exchange for a claim and an interest, a potential realization event resulting in taxable gain or loss. Therein lies the further inconsistency of the new person theory: under the current tax system, a bankruptcy does not trigger the realization of losses or gains by the creditors or shareholders, nor does it trigger the realization of losses or gains from the disposition of the property of the corporation. 69

Clearly, these tax laws do not treat the estate as separate from the pre-bankruptcy corporation, nor do they treat the estate as a successor to, or transferee of, the pre-bankruptcy corporation. In addition to the bankruptcy not triggering any taxable gains or losses, it also does not create a separate taxable entity, leaving the tax attributes of the corporation unaffected. 70 The corporation remains the same legal entity as before, only now in bankruptcy. 71

Under the new person theory, the lack of tax consequences might be explained by deeming the estate the successor of the corporation, thereby [*480] stepping into the corporation's shoes for tax purposes. This explanation, however, ignores the legal existence of the debtor. Once bankruptcy begins under the new person view, there are two entities - the debtor and the estate. Since the debtor would maintain a separate legal existence from the estate, there would be two taxable entities. In reality, however, there can only be one taxable entity. The estate could not possibly step into the shoes of the debtor as its successor because the debtor is still wearing them. Furthermore, a predecessor's tax attributes does not automatically pass to its successor. 72 For example, if Corporation A's property passes to Corporation B, then this would trigger the realization of gains and losses by A on the disposition of its property, and set B's basis in the property for determining the consequences of any dispositions by B in the future. 73 Such a transfer of assets, however, would not allow B to succeed to A's tax attributes. 74

The most notable exception to this, where the successor does inherit the tax attributes of its predecessor, is when the property passes as part of a tax-free reorganization. 75 Corporate tax laws provide that where property passes from one corporation to its successor, there will be no tax consequences if the form of the transaction falls into one of the categories of tax-free reorganizations. 76 Tax laws appear to recognize a change in the legal status of a corporation,

not upon the commencement of bankruptcy as mandated by the new person theory, but rather only if the bankruptcy concludes with a reorganization of the corporation that changes or shifts the financial structure, property, or ownership of the corporation. 77 The recognition of a change in the legal status of the corporation is not triggered simply by the fact that the corporation filed for bankruptcy, but by the actual changes made in the corporate structure of the debtor during reorganization. 78 Thus, the tax laws recognize that bankruptcy may transfer the debtor's property to a successor without tax consequences only if there are actual changes in the debtor or its property during the course of the bankruptcy. This sort of transfer does not occur automatically at the commencement of every case, as the new person view would indicate.

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The new person view further indicates that the commencement of bankruptcy not only transfers the ownership of the debtor's property, but also changes the ownership of the debtor. According to this view, the creditors become the owners of the new entity created by the transfer of property. 79 If a corporation has more losses than income in a given year, however, it can carry over the excess losses and set them off against future income, reducing its tax liability. 80 Thus, if a corporation has net operating losses from past years that it has not yet reduced to income, the net operating losses are in effect a present asset. 81 This presents a temptation to manipulate corporate forms in order to shift losses so that they can be used to offset the gains of another corporation. For example, suppose that Corporation A operates a money losing business making widgets and has accumulated a store of net operating losses. Suppose also that Corporation B operates a profitable ratchet making business. If the two corporations merged into Corporation A, then A's past losses could be used to reduce the tax liability on profits from the ratchet business.

To guard against such manipulation, the Tax Code limits the total amount of net operating losses one may carry over in any one year upon a change of ownership of a corporation. 82 Suppose, for example, Corporation A has net operating losses, and its sole shareholder X sells all the stock of Corporation A to Y. 83 Corporation A's ability to use those net operating losses to reduce future taxable income will now be subject to limitations designed to prevent Y from using Corporation A to shelter income from a source other than Corporation A's previous business. 84 The statute explicitly requires the corporation to continue its previous business enterprise for two years in order to retain the ability to carry forward net

[*482] operating losses. 85 Again, these tests may be applied during the course of a bankruptcy reorganization, except not at the commencement of the case, as would be the result if adhering to the new person view, but rather upon the confirmation of a plan of reorganization. 86 Thus, the net operating loss provisions of the Tax Code also view bankruptcy in a way consistent with the property view and contrary to the new person view.

In short, the corporate tax laws do not treat the estate as a new legal person, but rather view the debtor corporation as the same entity that existed before the petition, focusing on what happens to the debtor during the bankruptcy to determine if there are tax consequences. This approach is the same as the property view, which regards the commencement of the bankruptcy not as changing the corporate form of the debtor or transferring its property, but recognizing that changes may be made to the debtor or its property during the course of the bankruptcy.

A fundamental way in which individual bankruptcies under chapters 7 and 11

differ from a corporate bankruptcy, stems from the fact that an individual is permitted to exempt property from the bankruptcy estate, 87 and money that an individual earns after the commencement of the case does not become part of the estate. 88 This requires some differences in tax treatment. 89 The individual also receives the key benefit of having her debts discharged by the bankruptcy. 90 This treatment is quite different from the corporation, all the assets of which, whether received before or after the bankruptcy, are available to satisfy creditors. 91

The tax laws recognize this difference by treating individuals in chapters 7 or 11 differently from bankrupt corporations. The Tax Code treats the bankruptcy estate as a separate taxable entity from the individual, requiring the bankruptcy trustee to file tax returns on behalf of the estate. 92 While such an approach is in accordance with the new person view, it is a weak argument for a general characterization of the legal nature of bankruptcy estates. Separate treatment does not apply to corporate or partnership bankruptcies, and does not even apply to all individual bankruptcies. 93 Moreover, the separate taxation of the individual debtor

[*483] and the estate falls far short of treating the estate as a new legal person who is the transferee of the debtor's property. There are indeed two taxable entities where before there was just one. Yet for practical purposes the newly created entity is not the estate; it is the debtor. The tax attributes of the debtor belong to the estate, not to the debtor. 94 The estate receives not only the tax attributes that would seem to go along with the property, such as the basis in the debtor's property, but also net operating losses and charitable contribution carryovers. 95 Thus, for tax purposes, the estate continues the debtor's tax life, and the debtor becomes a new taxable entity created for the debtor's exempted property and post-petition earnings. This treatment is in accordance with the differences between an individual and corporate bankruptcy. These differences in tax treatment arise not at the creation of the estate, which is common to bankruptcy, but rather as a result of the differences between the types of bankruptcy, specifically the exempting property and excepting post-petition earnings. 96 Even this treatment, however, does not accord with the new person view, under which the estate is the newly created entity that would have a tax life of its own and not be affected by the debtor's rights and obligations, other than receiving the transfer of the debtor's property.

Finally, not only is the estate not treated as a new entity, it is not treated as completely distinct from the debtor. This is reflected in the fact that despite the separate taxable entities, the tax treatment of the debtor can affect the tax treatment of the estate. This appears most clearly in the discharge of indebtedness rules, which govern matters central to an individual bankruptcy. 97 A principal reason for an individual to go into bankruptcy is to have her debts discharged at the termination of the case. Normally, when a taxpayer has indebtedness discharged without paying the debt, the taxpayer must recognize taxable income. 98 If A borrows \$ 1000 from B, A has no taxable income, for although A received \$ 1,000 in cash, A also received an offsetting liability to pay B \$ 1,000. Where there is no net gain to A, there is no taxable income. If, however, A's debt is discharged without A repaying the money, for example if B forgives the debt, then A normally must recognize \$ 1,000 of income; A has a net gain of \$ 1,000. An exception to the rule occurs if A is insolvent or is in bankruptcy. [*484] A does not have to recognize any income because she is unable to pay her debts, so she receives no benefit from forgiveness of the debt. If A is insolvent, then A must reduce her tax attributes. If A's debts are discharged in bankruptcy, then the estate has to reduce the tax attributes assumed from A. 99 This interplay between the tax treatment of A and the tax treatment of the estate emphasizes that the tax laws

do not treat them as the independent entities that the new person view does.

Consideration of the relevant provisions of both the Code and the Internal Revenue Code, then, provides scant support for the new person view. Rather, both consistently favor the property view. Because the statutes do not absolutely exclude an interpretation relying on the new person view, however, we could use the new person approach should it prove to be a sounder basis for the analysis of questions that arise during a bankruptcy case. The next sections consider whether the new person view would nevertheless lend clarity to the analysis of important issues that arise during bankruptcy.

II. EXECUTORY CONTRACTS

The area of executory contracts is key to any discussion of the legal nature of the bankruptcy estate. Both the new person view and its predecessor, the new entity view, were largely developed in this area. The new entity approach was developed as a way to explain the trustee's power to reject or assume executory contracts to which the debtor is a party at the commencement of the bankruptcy. After the *Bildisco* decision appeared to reject the new entity approach, theoretical writing on executory contracts revived its functional aspects in the most thorough exposition of the new person view.¹⁰⁰ The new entity view is no longer needed to justify the power to assume or reject executory contracts, as section 365 now grants such power specifically.¹⁰¹ Several interpretive questions remain open, however, regarding executory contracts which are affected by how one views the legal nature of the bankruptcy estate: the treatment of contracts that are "personal" to the debtor, whether the trustee can enforce an executory contract before assuming or rejecting it, whether the debtor remains [*485] a party to contracts that the trustee does not or cannot assume, and whether a debtor in possession may assume executory contracts that a trustee could not have assumed. Each of the issues could be resolved quickly by treating the estate as a new legal person that becomes a party to the contract only if the trustee or debtor in possession assumes the contract. Such resolutions, though, lead to unnecessary complications in each area. By contrast, the property view necessitates a sounder analysis by requiring us to deal directly with the specific policies, rather than circumventing them.

A. *Bildisco* Rejects The New Entity Theory, But It Returns As The New Person View

The new entity view, predecessor to the new person view, grew out of efforts by some courts to deal with executory contracts, contracts to which the debtor is a party and that have not yet been fully performed by both parties. Courts have long held that when a debtor goes into bankruptcy, the trustee or debtor in possession is not necessarily required to perform the debtor's obligations under an executory contract.¹⁰² Rather, the trustee or debtor in possession has the power to choose to reject or assume the contract, subject to court approval.¹⁰³ Before the Bankruptcy Act or the Code explicitly provided the trustee with the right to assume or reject executory contracts, however, authority differed on the source of such a power. Some courts held that executory contracts were simply property of the estate, which the trustee was free to use or abandon like other estate property.¹⁰⁴ Other courts reasoned that commencement of the [*486] bankruptcy case breached the contract by operation of law, but the trustee could cure the breach by assuming the contract.¹⁰⁵ Both of these views are unsatisfactory. The first would require the trustee to pay for the use of

estate property, which is not normally required, and the second would require the development of a new view of contract law. 106 The new entity view was a third attempt to provide a basis for the right to reject or assume executory contracts. Courts reasoned that the trustee or debtor in possession was a new legal entity created by bankruptcy law which was not a party to the debtor's existing contracts and thus was only bound by them if they were assumed. 107

The new entity view was not a secure basis for the right to reject or assume executory contracts. The lack of a sound judicial basis was corrected by legislative action, however, by specifically granting this power in the Bankruptcy Act 108 and subsequently in section 365 of the Code. 109 Although that need for the new entity view disappeared, the potential power of the doctrine to support desired results for other questions regarding executory contracts and various issues in bankruptcy law remained. In the leading case of *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 110 reliance on the new entity view enabled the Second Circuit to circumvent an apparent conflict between the federal labor and bankruptcy laws. 111 The debtor in possession, a steel maker, sought to reject a collective bargaining agreement as an executory contract. 112 The union argued that the contract could not be rejected without compliance

[*487] with provisions of the National Labor Relations Act, 113 governing procedures and conditions for terminating or modifying a labor agreement. 114 The court held, however, that the debtor in possession was a new entity and therefore was not a party to the labor agreement. 115 Accordingly, it was not subject to the termination restrictions which applied to a "party" to a labor agreement. 116 Thus, the court did not have to decide whether the bankruptcy or the labor laws controlled the apparent conflict. The bankruptcy laws did effectively trump the labor laws, though, by creating an entity that acquired the property of the debtor without being subject to the restrictions on that property that had applied to the debtor.

The new entity view, however, suffered a grievous blow in *NLRB v. Bildisco & Bildisco*. 117 *Bildisco & Bildisco*, a general partnership in the building supplies business, was also a party to a collective bargaining agreement. 118 The partnership filed a chapter 11 petition and continued to operate the business as a debtor in possession. 119 *Bildisco & Bildisco* failed to meet several of its obligations under the collective bargaining agreement and subsequently rejected the collective bargaining agreement with approval of the bankruptcy court. 120 The National Labor Relations Board found that *Bildisco & Bildisco* had violated the National Labor Relations Act by unilaterally changing the conditions of the collective bargaining agreement and refusing to negotiate with the union. 121 The Third Circuit refused to enforce the Board's order, holding that the debtor in possession was a "new entity" not bound by the collective bargaining agreement. 122 Furthermore, because of the special status of collective bargaining agreements, the debtor in possession must meet a more stringent test than the usual "business judgment" rule to reject an executory contract. 123 A party seeking to reject a collective bargaining agreement must show that the agreement is burdensome and that the equities balance in favor of rejection. 124

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The Supreme Court affirmed. 125 The decision, however, did not rely upon the short cut offered by the new entity view, but rather upon examination of the specific issues. The Court rejected the new entity approach succinctly, indeed, without much analysis. As the Court explained:

Much effort has been expended by the parties on the question of whether the debtor is more properly characterized as an "alter ego" or a "successor employer" of the prebankruptcy debtor, as those terms have been used in our labor decisions. We see no profit in an exhaustive effort to identify which, if either, of these terms represents the closest analogy to the debtor-in-possession. Obviously if the latter were a wholly "new entity," it would be unnecessary for the Bankruptcy Code to allow it to reject executory contracts, since it would not be bound by such contracts in the first place. For our purposes, it is sensible to view the debtor-in-possession as the same "entity" which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing.

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Although the debtor in possession thus remained a party to the collective bargaining agreement, the Court held that it did not violate the labor laws by failing to meet its obligations under the contract. 127 Under chapter 11, the trustee or debtor in possession has until confirmation of the reorganization plan to assume or reject executory contracts, although it must pay the other party the reasonable value of any performance it elects to receive in the interim. 128 From this, the Court reasoned that the collective bargaining agreement was not enforceable against the debtor in possession until assumption, and therefore, in the interim, the Board could not require the debtor in possession to perform under the contract. 129

Bildisco indirectly blocks further reliance on the new entity view as the conceptual basis for executory contract law. In an exchange of articles with Jay Westbrook that cleared away much of the obscurity and needless technicalities of executory contract law, Michael Andrew revived the functional aspects of the new entity approach. 130 This perspective, the new

[*489] person view, respects the Bildisco holding that the debtor and the debtor in possession are the same entity. Under Andrew's approach, as under the new entity approach, when the debtor goes into bankruptcy, an executory contract does not become part of the estate. 131 The debtor remains a party to the contract. If and when the trustee assumes the contract, then the estate becomes a party to the contract. Thus, the new person view does not claim that the debtor in possession is a new legal entity, but makes that fact irrelevant:

A number of courts in executory contracts cases have puzzled over whether the debtor in possession is a "new entity" as compared to the debtor, in trying to decide whether the debtor in possession is bound by the debtor's contracts prior to assumption. What is important, however, is that the estate clearly is a new entity. The debtor in possession is the debtor, see Bankruptcy Code Sec. 1101(1), acting in a trust capacity as representative of that estate. The debtor can be displaced at any time by an independent trustee; thus, nothing should turn on whether the debtor and the debtor in possession are the same entity. The important issue is not whether the debtor in possession is bound by the debtor's contracts, but whether the estate is. 132

Thus, the new person view, developed as a response to Bildisco preserves the

effect, if not the form, of the new entity theory.

Despite respecting Bildisco's holding on whether the debtor and debtor in possession are different entities, the new person view does significantly depart from Bildisco's analysis. The Court squarely rejected the debtor in possession's argument that it was not a party to the labor agreement and therefore had no obligations under the relevant labor laws. 133 Consider an application of Bildisco's facts using the new person model. Under this view, the debtor in possession would be able to avoid the Bildisco result. The new person approach views the debtor in possession as an agent of the estate. Because the labor agreement would not have been assumed, the estate would not be a party to the agreement; thus the debtor in possession, acting as the estate's representative, would not have any obligations under the contract. This hypothetical parallels the very argument that the Court rejected. 134 Indeed, the new person view would [*490] complicate the analysis of Bildisco and provide little useful guidance.

The new person view recognizes, however, that the debtor in possession is the same person as the debtor. The new person approach also introduces an additional person to the picture, the bankruptcy estate, that becomes a party to the contract only if the contract is assumed by the agent of the estate. Until assumption, the debtor remains a party to the contract. Thus, in the interim, the debtor in its own right, not as debtor in possession, theoretically continues to be subject to such obligations. Because all of its property had been transferred to the estate, however, the empty-handed debtor has little with which to bargain.

Furthermore, during the period between the commencement of the bankruptcy and assumption or rejection of the contract, the estate, a stranger to the contract, would not be able to elect to receive performance from the other party. 135 The Bildisco Court, however, held that the debtor in possession could continue to elect to receive performance from the other party, provided that the debtor in possession continued to pay for the rendered performance. 136 This holding cannot be explained by viewing the debtor, as opposed to the estate, as receiving such performance in the interim because the money to pay for it would obviously have to come out of the estate. These complications are absent under the property view, which sees the debtor as the remaining party to the contract and recognizes that payments for performance are drawn from the estate.

The new person view also raises another possible problem during the interim before the contract is assumed or rejected. The automatic stay protects property of the estate but not property outside the estate. 137 If the contract became property of the estate only if assumed, then the other party could terminate the contract during the interim period. This course of action, if taken, defeats the ability to elect to receive performance during the interim. Under the property view, however, the contract remains part of the estate and is therefore protected. 138

[*491]

The new person approach also introduces some distortions into the rights and obligations arising from executory contracts. A central principle of executory contract law is that no more or less than the debtor's interest in the contract passes into the estate. 139 The new person view, however, can be used to circumvent this principle. For example, if the debtor is a party to a contract with an arbitration clause, the new person view would not bind the estate to arbitrate disputes arising out of the contract because the estate was not a party to the contract. The property view, on the other hand, takes the better approach by specifically examining both the relevant bankruptcy and arbitration

law issues in order to decide which is the more appropriate forum. 140

In addition to supporting attempts to shed obligations, the new person view can also be used to increase contractual rights. For example, a recent analysis of the effect of bankruptcy on director and officer liability policies suggests that bankruptcy may effect an increase in the scope of the liability. 141 Typically, such policies provide no protection where a corporation sues its own directors or officers. 142 The reason is that the corporation, its directors, and its officers are all designated as "insureds" under the policy, and the policies usually specifically exclude coverage of "insured v. insured" actions. 143 Suppose the corporation goes into bankruptcy, and the trustee or the debtor in possession sues the officers, alleging pre-petition misuse of corporate funds. If the estate is a new legal person, distinct from the corporation listed as an insured on the policy, then the suit would arguably no longer be subject to the "insured v. insured" exclusion. 144 Thus, simply by filing bankruptcy, the debtor's contractual [*492] rights are effectively increased.

The new person view also leads to an added risk for the nonbankrupt party. If the contract does not become part of the estate, then the debtor in possession could attempt to enforce the contract against the other party, despite the fact that all or most of the debtor's assets have been put into the bankruptcy estate. 145 This occurrence would in effect grant the debtor a free option on the contract. 146 The problems caused by the new person view unnecessarily multiplying the entities involved become even clearer when we recall that section 365 not only grants a general power to assume or reject executory contracts, but also provides that the trustee cannot assume certain executory contracts, such as contracts to make a loan to the debtor. 147 Suppose that a bank has a contractual commitment to make a loan to the debtor. If the debtor goes into bankruptcy, section 365(c) would clearly bar assumption of the contract by the trustee, the rationale being that a lender cannot be required to lend money to a bankrupt. Under the new person view, though, executory contracts remain with the debtor, even though the debtor no longer has any assets.

B. Assumption and Rejection of Personal Contracts

The treatment of personal executory contracts, those made in special [*493] reliance on the debtor, leads to the most dramatic effects of the new person view. Contract law has long recognized the limitations on a contracting party's ability to assign rights or obligations under what I will call a personal contract. 148 Similar limitations apply when one of the parties files for bankruptcy. Under section 365, the power of the bankruptcy trustee to assume executory contracts is subject to an important limitation: the trustee may not assume an executory contract that is nonassignable under applicable nonbankruptcy law, such as a personal services contract. 149 Section 365 codifies the historical practice of prohibiting the trustee from assuming a personal contract. 150 Two issues, however, are left unresolved by section 365: does section 365 apply to a debtor in possession; and does it apply to rejection, as opposed to assumption? The analysis of both issues depends on whether the estate is considered a new legal person.

Michael Andrew argues that the analysis is unaffected by the substitution of a trustee for the debtor in possession. 151 While his rationale may be the most persuasive in support of the new person view, his argument ultimately fails. First, any uniformity in such cases is greatly outweighed by the other distortions common to the new person approach. The area of personal contracts

provides a perfect example as to why the difference between a trustee and a debtor in possession should sometimes be considered in the analysis. Under section 365(c), the trustee may not assume an executory contract if applicable law excuses the other party "from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession." 152 The provision clearly prevents a trustee from assuming a personal contract. Courts have ruled differently, however, on whether it prevents a debtor in possession from assuming a personal contract. 153

Once again, the new person view answers the question too readily: a

[*494] debtor in possession simply exercises the powers of a trustee, who is the agent of the estate. If a trustee could not assume a personal contract, then a debtor in possession could not. But this logic circumvents both the policy and the statutory interpretation issues. The policy behind the rule against assumption of personal contracts is that under bankruptcy law, the nonbankrupt party signed a contract with the debtor who could not assign the contract to another party. The classic example is a contract for personal services. A contracts for the personal services of B; B cannot assign the contract to C, who may be ready to provide services of a similar nature, but not the personal services of B. Similarly, if B files for bankruptcy, A should not have to accept the personal services of B's bankruptcy trustee. Where B remains the debtor in possession, the rationale is less persuasive. There would be no transfer of services from B to the bankruptcy trustee. B would still be providing the services; what has changed is that B is subject to new rights and obligations as the debtor in possession.

The statutory issue is whether Congress mandated different treatment by legislating that a trustee could not assume a contract where otherwise applicable law excuses the other party "from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession." 154 The issue of whether a debtor in possession may assume a personal contract is unresolved, as courts have ruled both ways. 155 The property view would not mandate an outcome, but would force the analysis to address both the policy issue and the ambiguous statutory language.

The new person view also oversimplifies the analysis of the rejection of personal contracts. Two cases involving entertainers illustrate how the use of the new person view can distort the analysis by circumventing the real issues. In *In re Carrere*, 156 the debtor was an actress under contract with a television network to appear in a daytime soap opera. She received a much more lucrative offer to appear regularly in a prime time series. She filed a chapter 11 petition as a way of rejecting the soap opera contract. [*495] In its second argument, the network asserted that the bankruptcy petition should be dismissed because it was filed in bad faith. 157 The court, however, approached the matter as an issue arising under section 365, applying a version of the new person view. 158 The court first noted that a trustee could not have assumed such a contract, because the contract was "excluded" from the estate. 159 The court then discussed whether this prevented a debtor in possession from rejecting such a contract:

Upon the filing of a Chapter 11, Ms. Carrere created a new entity called a debtor-in-possession. That debtor-in-possession is not identical to the debtor herself. She is granted the rights and duties of a trustee (11 U.S.C. section 323). Therefore while the debtor (Tia Carrere) may have duties under the ABC contract and may wish to reject those duties, the debtor-in-possession (who represents the estate of Tia Carrere) has no rights or duties whatsoever in the

contract and therefore is a stranger to it. 160

As a stranger to the contract, the debtor in possession had "no interest in the proceeds of the personal service contract, nor in the contract itself." 161 This would be only a temporary setback, for even if the debtor in possession could not reject the contract, her contractual obligations would be discharged along with the rest of her debts at the close of the case.

The court's alternative holdings came closer to the real issues and indicated a surer way of resolving the matter. The court held that even if the debtor in possession could reject such a contract, it would not be permitted in this case because such a result would be inequitable. 162 The court also held that in any case, rejection would not prevent the nonbankrupt party from pursuing its equitable remedies in addition to monetary damages. 163 By relying primarily on the new person view to deal with an apparent bad faith attempt to get out of a personal contract, the court left a bad precedent for a case in which a debtor in genuine financial distress sought a fresh start. Such analysis avoided the real issue and resulted in too broad a rule.

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In *In re Taylor*, 164 James Taylor, the former lead singer of the band Kool and the Gang, had signed personal services contracts that required him, among other things, to make a number of record albums. 165 Payment was to be made, with some advance payments already made, to a corporation which was obligated to pay Taylor. 166 The corporation became insolvent. Taylor was left with an obligation to make several albums for which he was unlikely to receive payment. Taylor filed chapter 11 and sought to reject the contracts. 167 Rejection is more strongly supported by the facts of Taylor than those of Carrere. Rather than using bankruptcy simply as a means to unload a less lucrative contractual obligation, Taylor genuinely sought a fresh start. His liabilities significantly exceeded his assets, and he had no prospect of being able to pay all his creditors. Under Carrere's broad approach, however, such facts would be irrelevant. Because the debtor in possession could not assume the contract or its proceeds for the estate, the debtor in possession was a stranger to the contract and had no power to reject it. The Taylor court, however, took an approach consistent with the property view, holding that even if a contract could not be assumed, it could still be rejected. 168

Thus the new person view, which arose as an attempt to find an analytically elegant way to explain the power to assume or reject contracts, leads paradoxically to both oversimplification and unnecessary complications. 169 Many such problems arise from the dichotomy the new person view creates between the debtor and the person to which the debtor's property would be transferred - the estate. In contrast, the property view, tends to leave the property vested in the debtor, although subject to the various protections in the Code, therefore avoiding a number of unnecessary analytical obstacles and shortcuts.

III. CORPORATE POWERS, FIDUCIARY DUTIES AND CORPORATE GOVERNANCE

The property and new person theories present considerably different viewpoints of what happens to a corporation when it goes into bankruptcy. Under the property view, the corporation is simply the corporation [*497] in bankruptcy.

If the debtor remains in possession, then the corporate structure remains essentially intact, but the corporation also has the powers and the duties of a trustee. If a trustee is appointed, then the trustee would largely replace the corporation's management within the existing corporate structure. The corporation's property is not transferred to another entity, but becomes the estate and thus is subject to the automatic stay, as well as other provisions of the Code.

Under the new person view, things are quite different. There is a complete separation between the debtor corporation and the new legal person in which the debtor's former property is vested, the estate. Whether the debtor remains in possession or a trustee is appointed, the debtor maintains a completely separate legal existence. If a trustee is appointed, then the trustee acts as an agent of the estate. If the debtor remains in possession, the debtor corporation acts as an agent and fiduciary of the bankruptcy estate. Regardless of whether the debtor remains in possession, the debtor would be subject to new duties by the filing of the bankruptcy petition. In chapters 7 and 11, if a trustee is appointed, the debtor must file lists of creditors, assets, and liabilities and meet its other duties under section 521 and other provisions of the Code.¹⁷⁰ In chapter 11, the debtor in possession would also be subject to the duties of a trustee, but these duties would be external to the corporate entity of the debtor.¹⁷¹ The internal matters of corporate governance and fiduciary duties would not be directly implicated.

Various issues can arise in bankruptcy concerning the corporate powers and the corporate governance of the debtor: who is entitled to exercise the corporate powers of the debtor, what are the fiduciary duties of the debtor's management and directors and to whom do they run, and whether the shareholders of the debtor can hold elections of directors. Under the new person view, these issues could be resolved simply. The debtor would be a completely separate legal person from the bankruptcy estate, whose corporate powers would not become powers of the bankruptcy estate. A debtor in possession would not be entitled or required to exercise its own corporate powers on behalf of the bankruptcy estate, because in its role as debtor in possession it would only have powers derivative of the estate. The fiduciary duties and corporate elections of directors and officers would not be directly affected, because only the debtor's property, not its corporate structure, would be subject to the bankruptcy proceeding.^[*498]

This apparent simplicity, however, belies the two key faults of the new person view. In each of the areas discussed below, the new person view would often either oversimplify or unnecessarily complicate the analysis. These failings in turn all trace back to the cleavage the new person view imposes between the debtor corporation and its property by vesting the property in a new legal person. Creditors, shareholders, and other parties in interest have rights and obligations with respect not just to the property of the debtor, but also to the debtor itself. The corporation, not simply its property, is the subject of the bankruptcy process, especially in reorganizations. The new person view, by taking into account only the corporation's property, sows the seeds of its own analytical shortcomings.

A. Corporate Powers

We saw above that with respect to executory contracts, the new person view is problematic in that the estate could either gain rights or shed obligations

under an executory contract by claiming to be a nonparty to the contract. The area of corporate powers raises a different problem: the diminution in value of the estate. This could occur because only the property of the debtor would pass to the estate, thereby separating it from the corporate powers of the debtor which are needed to maximize the value of the estate. 172 Thus, the new person view again causes deviations from the basic norm that filing bankruptcy should not change the existing rights of the debtor and other parties in interest. This section will discuss two types of corporate powers, the right to waive the attorney-client privilege and the exercise of corporate powers necessary to use particular pieces of property.

The power to waive the attorney-client privilege poses a good example of how the new person view would oversimplify the analysis of an issue by bypassing an investigation of the real issues. To take a typical case, an officer of the debtor confers in confidence with an attorney representing the debtor. The debtor subsequently goes into bankruptcy and a trustee is appointed. The trustee seeks to waive the attorney-client privilege. Under the new person view, the analysis would be simple. The communication was between the debtor and its attorney. The legal person that

[*499] the trustee or debtor in possession represents is the bankruptcy estate, not the debtor. The privilege would remain under the control of the management of the debtor. The Supreme Court has not addressed the issue in the key situation, where the debtor remains in possession, but has dealt with it in a trustee case, in a manner consistent with the property view. In *Commodity Futures Trading Commission v. Weintraub*, 173 the Seventh Circuit essentially followed the reasoning outlined above in holding that the trustee could not waive the attorney-client privilege with respect to pre-petition communications. Thus, the new person view superseded the more subtle issues involved.

Although not directly addressing either the new person or property view, the Supreme Court reversed, relying on reasoning that implicitly rejected the new person view. 174 In sharp contrast to the Seventh Circuit's reliance on the new person view to make a complex issue simple, the Court looked to how the specific rights and duties accorded the trustee under the Code related to existing law on the attorney-client privilege. The Code authorizes the trustee to operate the debtor's business, sell or lease estate property, investigate the debtor's financial affairs, and bring actions to recover fraudulently transferred property. 175 In short, the trustee assumes the bulk of the management activity of the debtor. Outside bankruptcy, where management of a corporation is replaced, the new managers control the attorney-client privilege with respect to previous communications. 176 By analogy, the Court reasoned, a trustee who displaces the management of the bankrupt corporation should similarly control the attorney-client privilege with respect to pre-petition communications. 177 Especially important for present purposes is that the Court viewed the trustee as the displacing management of the debtor, rather than acting as the manager of a new legal person. 178 Outside bankruptcy, if Corporation A's property was sold to Corporation B, the management of Corporation B would hardly be able to waive Corporation A's attorney-client privilege. Thus, the Court, acting consistently with the property theory, viewed the trustee as replacing existing management, not as managing [*500] a newly created legal person.

Although the case before the Court involved a trustee, its reasoning gains support if we consider the same issue where the debtor remains in possession and wields the powers of a trustee. Under the property view, the analysis is straightforward and rightly so. Where the debtor remains in possession, it is entitled to waive its own attorney-client privilege. The new person view makes a simple issue much more complicated than is necessary. The estate itself would

not have the right to waive the privilege with respect to pre-petition communications because the estate was not a party to such communications. Nor could the debtor in possession waive the privilege by virtue of being the representative of the estate. Of course the debtor could waive the privilege because it was the client at the time of the communication. This creates a strange conflict of interest, similar to that discussed in the next section with respect to fiduciary duties. 179 Suppose that X, an individual who was an officer of Corporation A, conferred confidentially with her attorney, not in her capacity as an officer of Corporation A, but rather with respect to her own legal situation. X would not be bound to waive the privilege if it would benefit Corporation A, simply by virtue of her position. Exactly such a rule would be necessary for a debtor in possession to exercise its own corporate powers on behalf of another legal person. Thus, in order to conclude that a debtor in possession could waive the privilege with respect to pre-petition communications, the new person view would have to extricate itself from the unnecessary complications of its own making. The new person view made things too simple in the case of the trustee, and too complicated in the case of the debtor in possession.

Similar problems arise in situations where use of a particular piece of property requires exercise of a corporate power. I will specifically examine the separation of the debtor's property from those corporate powers needed to realize the value of such property. 180 Suppose a corporation is

[*501] the beneficiary of a letter of credit. To draw on the letter of credit, the debtor must present a certificate to which the secretary of the corporation has attested. The debtor goes into bankruptcy, a trustee is appointed, and the letter of credit becomes property of the estate. In *Farmer v. Crocker National Bank* (In re Swift Aire Lines), 181 the Ninth Circuit held that it is impossible to draw on the letter of credit after it becomes property of the estate because the estate is a new legal entity distinct from the debtor corporation. The court considered the separation between the debtor and the estate so complete that the debtor's officers no longer had any authority to act with respect to property of the estate. 182 Once again, the new person view might have been used as a shortcut to reach the correct result. In *Farmer*, the letter of credit may have been part of a larger transaction that would have, in effect, required a loan to be made to the bankrupt corporation, and the Code normally excuses lenders from obligations to lend once bankruptcy has occurred. 183 Rather than just holding that the letter of credit in that case need not be honored, which would have required carefully analyzing the entire transaction, the court used the new person view to hold generally that letters of credit requiring a certificate from the debtor need not be honored in bankruptcy. 184

Taken at face value, such a holding is contrary to at least two provisions of the Code designed to avoid such distortions in existing rights and obligations. Section 541 provides that property of the debtor goes into the estate, notwithstanding provisions against transfer or provisions that change obligations upon bankruptcy of the debtor. 185 Such a safeguard would be negated if the property goes into the estate but cannot be used. The Code also requires the debtor to cooperate with the trustee, 186 and

[*502] even specifically requires the debtor to execute any instrument necessary to consummate a reorganization. 187 Such requirements would similarly be unproductive if the debtor's actions could no longer affect estate property. Clearly such provisions indicate that the Code implicitly follows the property approach in viewing the debtor as retaining meaningful corporate powers.

A way to retain the new person view and also permit the estate to take advantage of the aforementioned corporate powers of the debtor would be to consider such

corporate powers to be "property" that passes to the estate. Apart from the inherent difficulty of such a broad conception of property, this would effectively strip the debtor of all its powers and pass them to the estate. Thus, there would be little left of the debtor but its name, or perhaps not even that under such a broad conception of property. 188 The result would be that the estate would effectively become the debtor corporation, vested with all its property and all its corporate powers. The debtor would still exist, but as a meaningless shell. This is really no different from the new entity theory rejected by *Bildisco*, that upon the commencement of the bankruptcy case the debtor corporation disappears and becomes reestablished as a new and separate legal entity, the debtor in possession. 189 Moreover, such a complicated means to reinvent the debtor corporation is unnecessary where the property view offers a means to keep the powers of the debtor associated with its property in a much simpler fashion.

B. Fiduciary Duties and Corporate Elections in Bankruptcy

In the last few years, courts and commentators have directed considerable attention to the fiduciary duties of the officers and directors of a debtor in possession. 190 Some hold that such fiduciary duties clearly run to

[*503] both creditors and shareholders, or to the estate as a whole, under existing law. 191 Other courts state that once the corporation becomes insolvent, whether in or out of bankruptcy, the fiduciary duties run only to the corporation's creditors, as the shareholders no longer have a valid interest in the corporation. 192 Some commentators fall somewhere in between, depending on the particular fact pattern. 193

Under the property view, state corporate law largely guides the analysis of such fiduciary duties. Of course, analysis based on state law is subject to any provisions of federal bankruptcy law which require a different result in certain situations. The property view does not favor any one position in a particular case. The property view, which sees the debtor simply as the corporation in bankruptcy, asks what state law requires of the directors and officers in a particular situation. The mere fact of bankruptcy should not control the issue. The property view's inquiry into state law also requires consideration of other factors, such as whether the corporation is insolvent, whether it is a closely held corporation, and what corporate law exists in the specific jurisdiction.

The new person view, on the other hand, offers a simpler approach.

[*504] The debtor in possession acts as a representative of the estate, and the duties of the officers and directors therefore simply run to the estate. Such clarity breaks down quickly when separate entities with different interests in the estate are affected differently by what is done with the estate property. The parties with an interest in the estate -- secured creditors, unsecured creditors, and stockholders -- are likely to differ as to the best way to administer it. Thus, regarding the estate as a new person whose interests are at issue only masks such conflicts.

In contrast, the property view, reminds us that the estate is only property and that the persons with interests at stake are those with an interest in that property, and in the debtor corporation generally. This distinction becomes clearer as we consider two specific attempts to provide an analytical framework relying on the new person view. The first attempt arrives at essentially the same result as the property view, but through an unnecessarily complicated framework. The second acknowledges that the determination of fiduciary duties

will ultimately require state law based analysis, but seeks to avoid this inquiry by dispensing with fiduciary duties completely. An analysis relying on the new person view to provide a clear division between the estate and the debtor corporation, however, must examine state law, or the division will ultimately break down.

Raymond Nimmer and Richard Feinberg have analyzed many of the corporate governance issues under a version of the new person view. 194 Their view actually falls somewhere between the new entity and the new person views. They attempt to regard the debtor in possession as the same entity as the debtor, as well as a newly created entity. 195 This is presumably to avoid running afoul of *Bildisco*. I largely agree with their conclusions, but think that the introduction of a new entity unnecessarily complicates the analysis. Indeed, their analysis could be reformulated in a simple way that would also be consistent with *Bildisco*.

Nimmer and Feinberg begin with the premise that the debtor in possession is "both a designation of status and a creation of an artificial legal entity." 196 Thus, the chapter 11 petition both modifies the rights and obligations of the debtor and creates a new artificial legal entity. 197 This premise is both contrary to *Bildisco* and confusing. Under *Bildisco*, the

[*505] debtor in possession is the former debtor, 198 which accords with the Code definition: " 'debtor in possession' means debtor." 199 Nimmer and Feinberg's view reduces the position of the debtor in possession from debtor to a new legal entity with certain rights and obligations. 200 Perhaps they are attempting to accommodate both the position that the filing of the petition replaces the debtor with a new legal entity called the debtor in possession and the position that the debtor does not disappear. 201 This attempt creates the following problem, however: if the debtor still exists and the debtor in possession is a new legal entity, what or who is this new legal entity? It cannot be the debtor because then the new legal entity would be an existing legal entity. In the end, Nimmer and Feinberg's analysis does not specifically identify anything or anyone as the debtor in possession. Rather, the debtor in possession is said to be "associated with" the managers of the debtor. 202

Nimmer and Feinberg further recognize that their position creates the problem of distinguishing between two overlapping entities, one of which is rather ill-defined. 203 Their solution is that "the metaphysics of distinguishing two artificial and overlapping legal entities need never be addressed in general terms." 204 Rather, they recommend that the analysis look to the "specific characteristics of the [debtor in possession] and the consequences of those characteristics" for corporate governance issues. 205 But this theory appears to be an indirect path to the point that the property view would go to directly: the debtor in possession is the same legal entity as the pre-existing debtor, but now must account for its modified rights and obligations. Indeed, the rest of their analysis is largely consistent with this approach. They conclude that management has obligations not only to the shareholders of the debtor but also to its creditors. 206 Nimmer and Feinberg support this result by relying heavily on the nonbankruptcy rule that "generally, corporate officers and directors stand in a fiduciary relationship with respect to their corporation and its shareholders. However, when the corporation is insolvent, these duties run to the

[*506] creditors." 207 In addition, the debtor in possession has new duties to the creditors because the managers became the debtor in possession, although such duties do not supplant the fiduciary duties to the corporation and its shareholders. 208 Rather, those nonbankruptcy duties remain in place, resulting in a "bifurcated responsibility." 209

A simpler way to reach a similar result would be to say that under nonbankruptcy law, management has fiduciary duties to the corporation, its shareholders, and, if the corporation is insolvent, its creditors. Furthermore, the corporation, as debtor in possession, would still be subject to the additional duties imposed by the Code. This statement is exactly what the property approach would dictate. Though there would still be a need to reconcile competing interests, analysis of particular issues would be made clearer. In determining what the obligations of management or the corporation are with respect to any issue, the initial question should aim to establish the source of the alleged duty. If the duty is one imposed by the Code, then it should be considered with reference to the relevant provision. Alternatively, if the duty is one imposed by corporate law, then it should be considered with reference to the state corporate law at issue. This would not be a simple matter. The analysis would likely have to take into consideration the state of incorporation, whether the corporation was insolvent, whether it was a close corporation, and any other facts made relevant by state corporate law. This is the same body of law, however, on which the approach of Nimmer and Feinberg would ultimately rely.

The new person view does not make analysis of the fiduciary duties of the corporation's officers and directors any easier; but perhaps it could be used to do away with the need for such analysis completely. Thomas Kelch has made a bold proposal that attempts to simplify the analysis of fiduciary duty issues in bankruptcy: that the debtor in possession should have no fiduciary duties at all. 210 Kelch reasoned that it would be better for the debtor in possession to have no fiduciary duties at all, given the number of difficulties he sees in determining what those duties would be. 211 His reliance on the new person view, however, causes his analysis

[*507] to overstate the likely benefits of his proposal and to undercut the attempt at simplicity by introducing even more complications.

Kelch recognized that the accepted view is that the debtor in possession does have fiduciary duties, 212 but after surveying some of the decisions in the area, he sees two principal problems. First, the content of the fiduciary duty of the debtor in possession is undefined. 213 There is a considerable body of law with respect to the fiduciary duties of insolvent corporations' officers and directors, 214 and several commentators have specifically attempted to delineate the content of those duties when the corporation is in bankruptcy. 215 But, under Kelch's view, these efforts have yet to yield a clear set of guidelines governing debtors in possession. 216 No case gives a comprehensive definition of the fiduciary duty of the debtor in possession. Some areas of the law have little case law on point, and the cases in the remaining areas are inconsistent with many of the results determined by the particular facts accompanied by judicial bromides. 217 Moreover, systematic attempts to work out guidelines based on the general principles of fiduciary duty have failed. 218

The second major problem, in Kelch's view, is that the debtor in possession has unresolvable conflicts among the interests of the potential beneficiaries of its fiduciary duties. 219 There are many situations in which the optimal use of the corporation's assets would be viewed differently by stockholders, unsecured creditors, and secured creditors, and even differently [*508] within those categories. 220 To take the most common example, secured creditors would often prefer that they be permitted to foreclose on collateral to satisfy their claim, while unsecured creditors and stockholders would prefer that the collateral be used in the debtor's business, even at the risk of loss of the collateral's value, in hopes of increasing the value of the estate as a whole. 221

Kelch's response to the lack of a clear set of guidelines for all the possible factual situations and to the conflicts of interest that many such situations may contain, is a rule in which the debtor in possession has no fiduciary duties. 222 Thus, Kelch proposes an adversarial model. The debtor in possession would still have a duty of care with respect to the estate property, but would not have any duty of loyalty to any of the various competing groups. 223 The management of the debtor could pursue whatever course of action it thought to be in its own best interest, and any party opposed to such action could resist it by seeking relief from the bankruptcy court. Rather than relying on fiduciary duties to control the debtor in possession, such parties would rely solely on the controls in the Code. The debtor in possession often needs court approval for many of its actions, such as use, sale, or lease of estate property; use of cash collateral; post-petition financing; assumption or rejection of executory contracts; and determination of claims. 224

In order for a chapter 11 plan of reorganization to be consummated, court approval is required both with respect to the disclosure statement about the plan and confirmation of the plan. Confirmation also requires the votes of sufficient creditors and equity holders. 225 Finally, any party in interest can seek to have the debtor in possession displaced and a trustee appointed. 226 Any party seeking to influence the behavior of the debtor in possession would rely on such controls, rather than on a combination of such controls and fiduciary duties. Indeed, in Kelch's view, such controls are so comprehensive as to make a debtor in possession's fiduciary duties superfluous. 227 The benefit gained from removing the fiduciary duties of the debtor in possession is a simplification of the process. In fact, because

[*509] it is not clear what the fiduciary duties of the debtor in possession are in all situations, since the debtor in possession often has conflicting interests in trying to serve the competing parties, and because the Code has so many controls on the debtor in possession, Kelch reasons that the best approach is to let the debtor in possession do as it wants and leave it up to the other parties to oppose its actions if they so choose. 228

Kelch is correct that existing case law has not fully spelled out what the debtor in possession's duty would require in all situations and that there are conflicts between various interests at stake. 229 The benefits of his proposed solution, however, are likely to be less than anticipated. Kelch relies heavily on a split between the debtor and the debtor in possession, implicitly following the new person view, a split likely to prove illusory. Kelch recognizes that Bildisco has raised questions regarding the new entity theory's viability. 230 Thus he posits a variation of the new person view that recognizes a distinction between the debtor and debtor in possession, not as two separate entities, but as two roles performed by the same entity. 231 He terms this "coexistence" and compares it to the distinction between the individual and trustee capacities of a common law trustee. 232 Accordingly, in its role as debtor in possession, the debtor would have the various rights and obligations of a trustee granted to a debtor in possession by the Code. The debtor in possession would retain as the debtor those rights and obligations granted by the Code to the debtor, such as the protection of the automatic stay, the obligation to file schedules listing property and creditors, and the right to propose the plan of reorganization, a right which is exclusive for at least the first 120 days of the bankruptcy. 233

Differentiation between the roles of the debtor and the debtor in possession would not permit the debtor in possession to operate free of fiduciary duties. Although some rights and duties belong to the debtor and others are acquired through the rights and duties of a trustee, there is an inevitable interplay between the two sets of tasks. If estate property is subject to security

interests, different parties in interest might prefer different courses of action. The senior secured creditor might prefer to see the stay lifted so it can foreclose and sell immediately to use the proceeds to pay her claim. If the proceeds from foreclosure would not be enough to

[*510] satisfy other claims as well, the other various creditors might prefer the debtor in possession to retain the property but offer it for sale only at a higher price. Unsecured creditors and shareholders might contend the property is necessary for a reorganization and should be used by the debtor in possession during the interim. Even these two groups could differ as to who should share in the reorganization. The unsecured creditors might favor a plan of reorganization that would grant them all the stock of the reorganized entity in return for their claims and give nothing to the shareholders. Such a plan could be confirmed if it were "crammed down" over the objections of the shareholders. 234 Thus, management of the debtor would have to choose whether to use its power as debtor in possession 235 or as the debtor. 236 It would not simplify matters to say that the debtor in possession has no fiduciary duties. If that were so and the debtor were free to act in a self-interested manner, only the form of the question would change, the substance would remain the same: what constraints are now imposed on management of the debtor?

The distinction between the debtor and the debtor in possession may be made as neatly as that between an individual and the individual acting as trustee in another person's bankruptcy. If an individual is appointed trustee, that individual not only has separate legal roles as individual and as trustee, but the individual also has her own separate existence. The individual's own property is separate from the estate, although the individual will receive some compensation for acting as trustee. The trustee's duty of loyalty rarely becomes an issue because it is clear. For example, if the trustee used the funds of the estate to lend money to a venture run by the trustee individually, that would obviously be improper. But, in essence, that is frequently what will be at issue with the debtor in possession, because the future prospects of the debtor are inextricably linked with the future of the estate.

Allowing other parties to seek court protection when they disagree with a course of action is also likely to return the focus of analysis to the very body of law Kelch's proposal seeks to avoid, specifically, case law on fiduciary duties. Where a party disagrees with a proposed course of action, even in the cases where the Code requires court approval, the Code does not always set the standard governing review of the debtor in possession's [*511] application. 237 Kelch's proposal would thus require extensive revisions to the Code in order to provide such standards. In the interim, courts would likely look to the cases where such problems have arisen before. Both legislators and courts would then be returning to the case law on fiduciary duties in bankruptcy. Thus, the very cases that Kelch's proposal hopes to render irrelevant would be needed to fill in the holes the proposal creates.

In addition, Kelch's proposal, by regarding the debtor in possession as separate from the debtor and proposing divestment of its fiduciary duties in bankruptcy, contradicts once again one of the basic tenets of bankruptcy, that bankruptcy should not alter the rights and obligations of the various parties unnecessarily. In practical terms, to the extent his proposal actually altered the fiduciary duties where the debtor remains in possession, then it would grant an advantage to management in the negotiation of nonbankruptcy workouts. Suppose Acme Corporation's debts exceed its assets, but Acme has not filed bankruptcy. Acme is involved in negotiations with its creditors to see if the various parties can reach a workout agreement, rescheduling or otherwise adjusting Acme's debt in order to avoid bankruptcy. Suppose also that, because Acme is

insolvent, relevant state law imposes fiduciary duties in favor of its creditors. If Kelch's proposal were adopted, Acme would have no fiduciary duties as debtor in possession if it filed bankruptcy. The proposal would not just change the rules for bankruptcy, but effectively alter the balance outside of bankruptcy, by giving one party an option to terminate another's rights by filing for bankruptcy.

In short, Kelch's proposal, while certainly intrepid, reflects the problems with the new person view in general. It relies on a distinction between the debtor and the estate in order to solve problems about the debtor, problems that require specific attention. Kelch's proposal would raise the stakes in one of the controversial areas of corporate governance, namely whether the shareholders can hold an election of directors when the corporation is in bankruptcy. Using the new person view to regard the debtor as entirely separate from the estate, the shareholders could simply elect a board of directors that would insert management amenable to the wishes of shareholders. If the debtor in possession were subject to no fiduciary duties, this would put considerable power into the hands of shareholders.

Most courts and commentators addressing the issue have concluded

[*512] that a chapter 11 filing does not suspend the ability of shareholders to hold elections of directors, but such elections may be blocked by the court if they endanger the reorganization process. 238 This is consistent with the property view that sees bankruptcy not as causing any change in the existing corporate structure but permits such changes to occur during the course of the proceeding. David Skeel recently proposed that elections of directors should be permitted in chapter 11 cases, but that voting rights should belong to the unsecured creditors rather than the shareholders. 239 In this section, I will argue that he reaches this conclusion by implicitly adopting a drastic version of the new person view, one that is inconsistent with his main point, that chapter 11 is consistent with existing corporate law. In one sense, Skeel implicitly rejects the standard new person view. If the estate were a completely new person independent of the debtor, then bankruptcy would not intrude at all on the shareholders' rights to hold elections. Skeel achieves the same result by leaving the debtor as the same corporate entity but divesting the shareholders of rights before the time that chapter 11 contemplates the confirmation of a plan.

Skeel's proposal came as one way of implementing the major point of his article: the rules governing voting with respect to chapter 11 plans of reorganization are largely consistent with the principles governing state

[*513] corporate law voting rules. He argues convincingly that the absolute priority rule and other facets of the reorganization process yield similar results to what state corporate law would require in the absence of bankruptcy. 240 But I am not convinced by the argument that it therefore follows that elections of directors during the pendency of a chapter 11 case should, in effect, be subject to the chapter 11 rules governing the confirmation of a plan. 241

Skeel relies on the economic view that chapter 11, in effect, results in a sale of the corporation's assets to its creditors. 242 Implicit in his analysis, however, is the proposition that the sale occurs upon the filing of the chapter 11 petition. As soon as bankruptcy is filed, under this view, the creditors become the owners and therefore should have the rights of owners, including the right to vote in elections of directors. Thus, in his view, the rights of the shareholders, the former owners, to vote on major sales of assets and to elect boards of directors, are extinguished, and such rights are, in turn, given to

the creditors, the new owners. The effect of this would be that the assets are now in a legal entity no longer subject to shareholder control except for their eventual voting rights with respect to the plan of reorganization. Thus, major changes that could occur only pursuant to a plan would be effected without meeting the procedural safeguards that chapter 11 imposes as a condition to divesting the shareholders of their interest. 243

By relying on an analogy to a sale occurring at the beginning of the chapter 11 case, rather than upon confirmation of a chapter 11 plan, Skeel is thus arguing against large parts of chapter 11 itself. His proposal that shareholders be divested of voting rights with respect to directorial elections and major asset sales is really an argument against letting shareholders maintain their rights during bankruptcy at all. 244 But that is an ill

[*514] fit with Skeel's more general argument, that the chapter 11 voting rules accord well with state corporate law voting rules. These voting rules in turn reflect the general principle that bankruptcy should not disturb preexisting substantive nonbankruptcy rights. Indeed, a leading proponent of the economic model has stated that the better view is to regard the sale as one that occurs at the time the plan of reorganization is finally confirmed and to consider the process of negotiating the formulation of the plan as analogous to the negotiation of the sale. 245 If Corporation A had an election of directors during the time it was negotiating to sell all of its assets to Corporation B, the shareholders of B would hardly have a right to vote. Thus, the immediate extinction of shareholders' rights would be inconsistent with the chapter 11 process, at least as it is presently constituted. 246

Viewing the estate as a separate legal person from the corporation thus distorts the analysis of corporate law issues in bankruptcy in a number of ways. It separates the property of the debtor from corporate powers that may be necessary to realize the value of the property. Furthermore, it makes the analysis of fiduciary duties murky, potentially nullifying rights in the corporation that the reorganization provisions seek to preserve.

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IV. DOES A NONECONOMIC THEORY OF BANKRUPTCY REQUIRE THE NEW PERSON VIEW?

The theoretical impetus behind my position on the legal nature of the bankruptcy estate is pragmatic. Rather than attempting to find a fundamental characterization of the estate's legal nature, a cogent bankruptcy analysis requires a functional approach that looks to the effects of everyday practice. The previous sections addressed the doctrinal effects of the new person view, arguing that it tends to have the effect of bypassing relevant analysis through oversimplification, misdirection, and unnecessary introduction of extra legal entities. This section examines the place of the new person view in bankruptcy law more generally, and considers primarily whether the new person view is necessary for a noneconomic theory of bankruptcy law. The leading bankruptcy theory advocates an economic position, that bankruptcy law exists primarily as a means to make debt collection more economically efficient. 247 A number of commentators have attacked the economic theory on the soundness of its economic grounds. 248 I am sympathetic to the view that it is not necessary to attempt to reduce to a single paradigm all of the goals that we attempt to accomplish through the bankruptcy laws. 249

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Donald Korobkin, however, has presented a theory that rivals the economic model 250 and attempts to provide an overall theory of bankruptcy. 251 Korobkin's

formulation relies explicitly on a version of the new person view and criticizes the economic theory for its limited view of the estate as only property. Here I examine not the merits of Korobkin's theory generally, but rather his reliance on the new person view. If the new person view is necessary to a non-economic theory of bankruptcy, then we must consider whether accepting the doctrinal disadvantages of the new person view outweigh being bound to an economic explanation of bankruptcy. In other words, if the property view necessarily leads to a purely economic view of bankruptcy law, there must be a viable alternative. In this section, I look at the role the new person view plays in Korobkin's theory: whether it is necessary to his theory, and even whether it is helpful to his theory, 252 concluding that the new person view is not necessary for his theory and indeed undermines it.

The economic model of bankruptcy advances the position that bankruptcy law pertains primarily to debt-collection and serves as a response to the problem of an insolvent debtor with more obligations than it has the ability to fulfill. 253 Where the debtor's liabilities exceed its assets, each

[*517] creditor has a strong incentive to take immediate action to fully recover the debt owed, and let the other, slower creditors go unpaid. A likely consequence of such creditor behavior is an ensuing race for the debtor's assets, which will lead to creditors as a whole receiving less than they otherwise would have if they acted to maximize the assets available. 254 For example, if the debtor has a business that generates enough income to pay all creditors most of their claims, it is generally inefficient to allow one creditor to foreclose on a valuable piece of machinery.

Beyond the problem of decreasing the payments to creditors as a whole, a race among creditors could also change the entitlements. Although two creditors could have essentially equal rights against the debtor, one could be paid in full while the other could go unpaid. Thus, individual action by creditors may distort both the order in which they are paid as well as reduce the overall amount of assets available. The possibility of a claims race imposes costs on creditors to monitor each other's behavior so as not to be left at the starting gate. Creditors could effectively reduce these monitoring costs through formal agreements, but because creditors are so diverse and change over time, bargaining costs would probably outweigh monitoring costs. Thus, the creditors are subject to what economists call a "prisoner's dilemma" or more specifically a "common pool" problem. 255

The economic view posits bankruptcy law as a response to this problem. It views bankruptcy law as the bargain that creditors, if they could bargain costlessly, would reach in order to avoid the aforementioned costs and maximize their expected return. Bankruptcy law replaces individual actions with a collective action. A collective action proceeding seeks to maximize the amount available to creditors and distributes the amount according to the creditors' pre-existing nonbankruptcy rights. Thus, the creditors' bargain is an economic explanation and justification of bankruptcy law.

The economic perspective lends itself to a view of bankruptcy analysis more congenial to the property view than the new person view. When implementing a hypothetical creditors' bargain according to the economic

[*518] view, the rights and obligations of the creditors and the debtor should resemble as closely as possible the way those rights and obligations would have been resolved under nonbankruptcy law, except without the litigation and accompanying depletion of the debtor's assets. 256 Thus, in analyzing the method in which issues should be resolved in bankruptcy, the common test is to determine how the analogous issue would have been decided outside of bankruptcy.

In contrast, the new person view is generally not used to decide how the issue would have been decided outside of bankruptcy. Rather, the new person view is used to eliminate existing nonbankruptcy rights and obligations. For example, the new person view supports the termination of contract obligations, 258 nullification of corporate powers, 259 and changes in corporate structure 260 upon the commencement of bankruptcy. This is contrary to the basic approach of the economic model, which seeks to preserve as much as possible the existing nonbankruptcy rights and obligations. The property view seeks the same results. The property view results in fewer changes because it treats the debtor in possession as simply the debtor corporation in bankruptcy. When analyzing specific issues, the property view is more likely to require scrutiny of the relevant nonbankruptcy law because the short cuts of the new person view are not available. Thus, the property view comports with the economic model better than the new person approach. If the property view supported only an economic view of bankruptcy, however, that might justify considering use of another approach.

Korobkin's theory of bankruptcy is an alternative to an economic explanation of bankruptcy. He attempts to show both that the economic theory does not explain why bankruptcy law should exist as a distinct body of law and to supply a theory that does. Korobkin believes that the fundamental flaws of the economic approach are: treating the corporation simply as a pool of assets to be distributed among creditors in the most efficient way possible, and ignoring the noneconomic impact the debtor corporation has on noncreditors. 261 In Korobkin's view, this results in the economic theory's failure to account for other moral, political, and social

[*519] values that play a part in bankruptcy. 262 Indeed, a purely economic view of bankruptcy is hard-pressed to account for the existence of the corporate reorganization provisions of chapter 11, which have been widely criticized as economically inefficient. 263 Rather than simply providing a way to divide the corporation's assets among its creditors, Korobkin believes bankruptcy law provides a forum in which all those affected by a corporation's financial distress can express their varied moral, political, and personal grievances. 264

Korobkin relies on the new person view to support his theory. He distinguishes the economic approach by its treatment of the estate as property and bases his theory on an alternative perspective: the estate as a new person. 265 Korobkin believes the economic approach regards the bankruptcy estate simply as being property because it views the corporation simply as a pool of assets. He states that such a view might be appropriate if bankruptcy consisted only of liquidation of assets, analogous to the administration of a decedent's estate. 266 But reorganization, in Korobkin's view, involves more than just economic decisions about the disposition of assets. In order to include more than simply economic decisions in the bankruptcy process, Korobkin states that we should take a broader view of the bankruptcy estate, a view that relies on the new person approach. He explained, "The focus of this ongoing debate is the bankruptcy estate, a legal entity removed from the historic business in distress. The estate should be seen not merely as a pool of assets; instead the estate should be viewed as an evolving and dynamic enterprise, capable of having diverse aims." 267 Korobkin implements his perspective by adopting and viewing the estate as the successor to the debtor corporation. 268

Korobkin relies on a view of the estate as a person rather than property because in his view, property alone does not have dynamic potential

[*520] but a legal person does:

Dealing with personality involves an entirely different kind of problem from dealing with property. Quite simply, property is an object. It can be acted upon; it does not act back. It can be gathered, sold, and distributed. In contrast, a person is an agent. A person is capable of making choices and changing. 269

Due to the broad definition of the property that comprises the estate, however, Korobkin's reliance on the new person view is unnecessary. It is not necessary for the bankruptcy estate to be treated as a legal person to have dynamic potential. Korobkin's view of property, which sees it only as objects, incapable of change or of affecting people in noneconomic ways, is too narrow. The property of a debtor is much more diverse and dynamic than the physical objects that the debtor owns at the time a bankruptcy petition is filed. The Code is written broadly and all the debtor's property rights are included in the estate: rights in physical objects, contract rights, patents, governmental licenses, partnership interests, etc. 270

The problem arises when one identifies the legal concept too closely with the social or economic concept of the enterprise. As Korobkin explained, "Unlike mere property, a corporation has potential as an enterprise: it can continue to evolve and even change its personality." 271 The enterprise, however, does not have to be identified with the corporation. For example, an individual might conduct business as a sole proprietor and not as a corporation. The individual's enterprise might include only property interests. These interests, however, could have dynamic potential for her and others with an interest in the property. Similarly, property rights in executory contracts, a key property right in bankruptcy cases, have dynamic potential. Contracts do not simply represent exchanges of goods. Rather, they can represent the legal aspect of continuing and evolving relationships. 272

Various legal arrangements may be utilized by the individual that support the Korobkin vision. These arrangements may be legal persons, such as corporations and partnerships, or they may be property interests,

[*521] such as contracts and joint tenancies. Indeed, the Uniform Commercial Code includes in its definition of organization, "two or more persons having a joint or common interest," 273 and defines person as including "an individual or an organization." 274 Similarly, tax jurisprudence recognizes that what in form may be joint ownership of property may be equivalent in function to a partnership - a legal person. 275 Rather, partnership income tax laws indicate that no dichotomy exists between legal persons having dynamic potential and property being inert. 276 In sum, a view of the estate as a person is not necessary for it to have dynamic potential. The legal concepts that we call property can have dynamic potential just as the legal concepts that we call persons.

The dynamic potential of the estate could actually be decreased by the doctrinal effects of the new person view. For example, by separating the property of the debtor from the debtor's corporate powers, the new person view creates obstacles to making the fullest use of the property. Moreover, by creating a new person and transferring the debtor's property to it, the new person view risks cutting off persons with interests in the estate, such as contract partners and shareholders. Indeed, the goal of maintaining the dynamic potential of the enterprise may be best met simply by leaving the enterprise as a single intact

entity, rather than two artificially separated entities. In any event, the new person view is clearly not necessary for maintaining the dynamic potential of the estate.

Another objection to using the new person view as a basis for Korobkin's theory is that it restricts the breadth of his theory as a justification for bankruptcy. Using the new person view, the theory applies only to reorganizations of corporations and not to corporate liquidations or to any individual bankruptcies. 277 Korobkin states that the estate would be viewed simply as property to be disposed if bankruptcy were only a liquidation process. 278 Korobkin also limits his discussion to corporate reorganizations, omitting all individual bankruptcies. 279 These limitations would be unnecessary if the estate is viewed as property. Accordingly, the scope of his theory could then extend to all bankruptcies. Moreover, reliance on

[*522] the concept of the estate as a new legal person would limit the effect of bankruptcy to when a bankruptcy has actually been filed. The reach of bankruptcy law, however, goes well beyond actual bankruptcy. 280 Whether the possibility of one party's bankruptcy is remote, as where one party takes a security interest, or close, as where parties engage in negotiation and reach workouts outside bankruptcy, bankruptcy law enters into the decisions of all parties affected. 281 Indeed, in a "prepackaged" bankruptcy, the entire process of negotiation, the voicing and resolution of the various competing visions of the enterprise's future, can take place before the petition is even filed. 282

In fact, by limiting the scope to corporate reorganizations, Korobkin's theory exposes itself to one of his major objections of the economic view. Korobkin faults the economic view because it does not address large parts of bankruptcy law, specifically the discharge provisions and "fresh start" policy. 283 But a theory of bankruptcy that turns only on corporate reorganizations is also incomplete. If, assuming Korobkin's theory applies only to corporate reorganization, and the economic view justified bankruptcy in general but included reservations about whether we should abolish the corporate reorganization provision, then the two theories would be consistent. They would be theories of separate bodies of law, indeed complementary theories of two areas of bankruptcy law. But Korobkin's theory is specifically intended as an alternative theory to the economic view, and should thus be positioned to displace it.

Korobkin's approach could reach beyond corporate reorganizations in that the concerns in his analysis appear in corporate liquidations and in individual bankruptcies. When a trustee is charged with the liquidation of a bankruptcy estate, the Code imposes a number of procedural requirements upon the trustee to ensure individuals have the opportunity to present their view of what should be done with the bankruptcy estate. 284 The

[*523] trustee cannot assume executory contracts, sell property of the estate other than in the ordinary course of business, abandon property of the estate, or hire professionals without court approval. 285 Because these requirements exist, interested parties are able to voice their opinion of the best course of action. If a theory of the estate is needed for a theory of bankruptcy law in its entirety, it would have to be one that is consistent with more than just chapter 11. By using the property approach, Korobkin's theory could be so extended.

V. CONCLUSION

The property view, in the final analysis, consistently shows two important advantages over the new person view, both of which turn on the fact that the property view results in the legal person of the debtor being more integrated into the bankruptcy process. First, even though the main reason for the new person view was an attempt to simplify bankruptcy analysis, on close analysis, the new person view actually increases complications by postponing them and often multiplying them. For example, while it offers to simplify the analysis of executory contracts by saying that the estate is a stranger to the debtor's contracts, this raises more questions: whether the debtor is still a party; if so, what are the consequences for both the debtor and the other party to the contract; and whether a debtor that remains in possession may assume or reject a "personal" contract.

The new person view also attempts to remove the estate from entanglement with issues of the debtor's corporate powers and corporate governance by categorizing the estate as a separate legal entity not concerned by the debtor's internal corporate issues. But, unless bankruptcy law is radically changed, the liquidation or reorganization of the debtor's property cannot proceed in isolation from the debtor. Exercise of the debtor's corporate powers, such as executing documents or waiving the attorney client privilege, may be necessary to realize the value of the property of the estate. If no trustee is appointed, the governance and fiduciary duties of the debtor in possession are inextricably involved in the bankruptcy. Even if a trustee is appointed, the trustee may need to control some powers in order to administer the estate. Treating the debtor as completely separate from the estate introduces a number of distortions in the rights and obligations of all the parties involved. The property view avoids these

[*524] distortions by avoiding the unnecessary division of the debtor from its property.

The second key advantage of the property view is its focus of the analysis on the relevant rules rather than preempting them with an argument-ending bankruptcy rule. Bankruptcy should change the existing rights and obligations of interested parties only where procedurally necessary. The new person view tends to radically change rights and obligations from the onset of the bankruptcy. This would mechanically terminate contractual and other rights, and nullify corporate powers. By contrast, the property view forces us to examine the particular rights and obligations at issue and determine whether that specific area of bankruptcy law requires modification of the existing rights and obligations. Thus, it makes the analysis of particular issues depend not on how they happen to come out if the estate is considered a new legal person, but rather on the implementation of the particular policies at issue. 286

Accepting the doctrinal difficulties raised by the new person view might be necessary if the statutory framework required the new person view or if the property view excluded any theory of bankruptcy other than an economic approach, but neither condition holds. The relevant provisions of the bankruptcy statutes and the tax statutes relevant to bankruptcy cases both favor the property view over the new person view. The property view is also amenable to both an economic theory of bankruptcy and a noneconomic one. Where the new person view thus proves to be unhelpful and unnecessary, bankruptcy law is better served by the property view.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law > Federal Income Tax Computation > Deductions for Losses > Net Operating Loss (IRC secs. 172, 382) > Carryforwards
Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles
Tax Law > Federal Income Tax Computation > Effects of Bankruptcy > Corporate Tax Attributes

FOOTNOTES:

n1 Traditionally, a person's estate consists of the various property interests belonging to that person. Thus, a decedent's estate was simply a collection of various property interests that needed to be disposed of after the person's death. See *infra* note 43. Accordingly, an estate was not itself a legal person, and cannot sue, be sued, enter into contracts, own property, or exercise the rights of a legal person such as a corporation. 33 C.J.S. Executors and Administrators section 3 (1942 & Supp. 1993).

n2 See *supra* note 1.

n3 To simplify this discussion, I will refer to the new person view as including both theories, except where the distinction is relevant.

n4 465 U.S. 513 (1984).

n5 *Id.* at 521.

n6 *Id.* at 527-29. The Court, however, did not broadly address the legal nature of the bankruptcy estate.

n7 For an example of a decision completely misstating *Bildisco*, see *Second Pa. Real Estate Corp. v. Papercraft Corp.* (In re Papercraft Corp.), 126 B.R. 926, 931 (Bankr. W.D. Pa. 1991) (quoting the Third Circuit opinion in *Bildisco*, see *NLRB v. Bildisco & Bildisco* (In re Bildisco), 682 F.2d 72 (3rd Cir. 1980), *aff'd*, 465 U.S. 513 (1984), for the proposition that a debtor in possession is "a new entity, separate and apart from the pre-bankruptcy company" and citing the Supreme Court affirmation of that opinion, but ignoring the fact that the Court expressly rejected the Third Circuit on the "new entity" argument). Compare *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149, 1153 (3rd Cir. 1984) (following *Bildisco* and rejecting the new entity approach when deciding whether a trustee is bound by an arbitration clause in a pre-bankruptcy contract signed by the debtor) with *In re West Elec., Inc.*, 852 F.2d 79, 83 (3rd Cir. 1988) (addressing issues of assignment and assumption of a personal executory contract because the debtor in possession and the debtor are "materially distinct entities" making assumption by the debtor impossible and as nonbankruptcy law excuses the party from accepting performance from an assignee, holding that the debtor in possession cannot assume the contract without consent of the other party).

The Eighth Circuit recently rejected the new person approach in the areas of mutuality and postpetition obligations. See *United States v. Gerth*, 991 F.2d 1428 (8th Cir. 1993).

n8 See *Bank of New England v. Klein*, 86 B.R. 897, 898 (Bankr. S.D. Tex. 1988) (stating that the debtor and debtor in possession are different legal entities without addressing *Bildisco*'s contrary language); *Clendenen v. Van Dyk Oil Co.*

(In re By-Rite Distrib.), 89 B.R. 906, 910 (Bankr. D. Utah 1988) ("Strictly speaking, there is no debtor's business once a petition has been filed creating an estate under Section 541 and a new entity, the debtor in possession, to manage that estate."); In re Seaco Inc., 82 B.R. 821, 822 (Bankr. E.D. La. 1987) ("The Debtor-in-Possession holds a position similar to a Trustee in Bankruptcy and thus, is to be considered as separate entity from the Debtor."); In re Dente/Pender, 60 B.R. 164, 165 (Bankr. M.D. Fla. 1986) ("Moreover, there is respectable authority to support the proposition that a Debtor-in-Possession is a separate entity from the taxpayer. . .").

n9 See, e.g., Merrill v. Abbott, (In re Indep. Clearing House Co.), 41 B.R. 985 (Bankr. D. Utah 1984), rev'd on other grounds, Merrill v. Allen (In re Universal Clearing House Co.), 60 B.R. 985 (D. Utah 1986). For the proposition that the debtor in possession was a new entity distinct from the debtor, the court relied upon Shopmen's Local No. 455 v. Kevin Steel Prods., Inc., 519 F.2d 698, 704 (2nd Cir. 1975). The Merrill court stated in a parenthetical that Bildisco had rejected the new entity view "for purpose of rejecting collective bargaining agreement under 11 U.S.C. section 365" without acknowledging that thus Bildisco rejected the theory of Kevin Steel, also a collective bargaining case. Merrill, 41 B.R. at 999.

n10 See infra notes 11-15. See also United States Small Business Admin. v. Gore (In re Gore), 124 B.R. 75, 78 (Bankr. E.D. Ark. 1990).

n11 82 B.R. 174 (Bankr. D. Mass. 1987).

n12 Id. at 177.

n13 Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.), 67 B.R. 899, 901 (Bankr. E.D. Tenn. 1986). For a cautious attempt at retaining the new entity doctrine, see Henderson v. Buchanan (In re Western World Funding), 52 B.R. 743, 772 (Bankr. D. Nev. 1985) ("In some respects it is helpful to think of a debtor as a new entity, and the trustee as its new owner."). Using the concept to clarify the analysis but not to trump competing nonbankruptcy rules could be unobjectionable, particularly if it looked to nonbankruptcy law to determine whether the debtor should be considered a new entity in the relevant context.

n14 In re O.P.M. Leasing, 68 B.R. 979, 983 (Bankr. S.D.N.Y. 1987).

n15 A case exhibiting great confusion about the new entity view after Bildisco is In re Toyota, Inc., 135 B.R. 471, 475 (Bankr. S.D.N.Y. 1992). The court held that, Bildisco notwithstanding, the debtor in possession was a different legal entity from the pre-petition debtor as a result of all the equity stock of the debtor having been sold to a new owner. Selling a corporation's stock does not make it a new and separate legal entity. Otherwise, a corporation would shed all of its debts and obligations when its stock changed hands; corporate bankruptcy would no longer be necessary. Toyota is rather unlikely to be followed on this point. Indeed the court itself found that having a new owner buy 100% of the equity stock has:

significance with respect to the movants' argument that this case should be dismissed pursuant to 11 U.S.C. section 1112(b) for cause In determining whether or not the debtor can realistically propose an effective plan of reorganization, the court must focus on the issue in the context of the capabilities of the new management rather than the prospects available to the debtor's former shareholders.

Id. at 475. Such a limited utilization of the new entity approach gives a good example of the confusion that the new person view engenders and how courts seek to use it as an analytical trump card.

n16 The process of the new person doctrine developing as a replacement for the new entity doctrine is well illustrated in *Patton v. John Deere Co.* (In re Durham), 87 B.R. 300, 302 (Bankr. D. Del. 1988). The Patton court acknowledged that under *Bildisco* the debtor and debtor in possession were not separate entities. The court, however, stated without explanation that *Bildisco* was distinguishable and that the estate, as a new entity, was not a party to the debtor's contract. The court wrote that, "the estate is a new entity. In a Chapter 11 case, the debtor becomes a debtor in possession charged with the duty of preserving that estate." Id. So while a new entity is created, the estate, the Patton court moved to the new person view by only conceptually separating the debtor in possession, as representative of the estate, from the debtor. Had such reasoning applied in *Bildisco*, the Court would not have addressed the issue of whether the debtor and debtor in possession were distinct entities. Rather, the question would have been whether the estate was bound by the collective bargaining agreement.

Patton also illustrates a typical use of the new person approach as a shortcut to circumvent necessary analysis. In Patton, the debtor in possession used estate funds to insure a combine. Pursuant to a security agreement, a creditor had a lien on the combine and any proceeds from it, and was obliged to pay insurance costs for the combine. After the combine was destroyed by fire, the creditor sought the insurance proceeds. The court, rather than deal with complex Code rules governing postpetition liens, simply held that the estate was not a party to the security agreement and thus not obligated to turn the proceeds over to the creditor. This reasoning not only ignores section 541 which provides that the estate shall include the debtor's interest in property and no more, but it also raises serious questions about whether any lien would be effective if the estate were not subject to it.

n17 11 U.S.C. sectionsection 101 et seq. (1988). Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at U.S.C. sectionsection 101-1330), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as amended in various sections of 11 U.S.C.); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in various sections of 11 U.S.C.); Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); and Treasury, Postal Service and General Government Appropriations Act of 1990, Pub. L. No. 101509, 104 Stat. 1389 (codified as amended in various sections of 28 U.S.C.) [hereinafter Bankruptcy Code or Code].

n18 See supra note 8. Although the Code specifically grants the debtor in possession certain powers of the trustee, see 11 U.S.C. sectionsection 1106, 1107 (1988), some courts nevertheless characterize the debtor in possession as a new entity with such new powers. See, e.g., *Still v. Rossville Bank* (In re Chattanooga Wholesale Antiques, Inc.), 67 B.R. 899, 901 (Bankr. E.D. Tenn. 1986) (debtor in possession using powers of trustee to avoid transfers under section

544); *Great S.W. Supply Co. v. Ernest and Assoc. (In re Ernest and Assoc.)*, 59 B.R. 495, 498 (Bankr. W.D. Tex. 1985) (applying the new entity approach to allow the debtor in possession, as distinguished from the debtor, to use powers of the trustee to avoid a transfer pursuant to section 544); *Blehm Land & Cattle Co. v. Wilkins (In re Blehm Land & Cattle Co.)*, 38 B.R. 648, 650-51 (Bankr. D. Colo. 1984) (holding that the debtor in possession's powers to avoid fraudulent transfers were not constrained by limitations on a debtor's ability to exempt property from the estate); *B&W Enter. v. Goodman Oil Co.*, 19 B.R. 421, 425 (Bankr. D. Idaho 1982) (debtor in possession uses ability to avoid post-petition transfers). See also *In re Banhalmi*, 84 B.R. 123, 125 (Bankr. N.D. Ill. 1988) (invoking the new entity doctrine to hold that a court order was necessary for debtor's pre-petition counsel to become counsel for debtor in possession, despite section 327 requiring such an order).

The court in *Ernest* also stated that although a statutory materialman's lien was perfected against the debtor, it is an unperfected lien against the debtor in possession. *Ernest and Assoc.*, 59 B.R. at 498. Read more narrowly and shorn of the new person language, the opinion states that the debtor in possession may use the specific power granted under section 544 to avoid any lien where it could not have been successfully asserted against a bona fide purchaser.

n19 For an attempt by a litigant to manipulate the new person doctrine, see *Felixstowe Dock & Ry. Co. v. United States Lines*, 2 Lloyd's Rep. 76 (1987). The debtor in possession, who was subjected to a number of injunctions, contended unsuccessfully that there could be no jurisdiction against its property for such injunctions because the debtor had been divested of its property and now held it in trust for the benefit of its creditors. See also Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 479 n.73 (1991) (characterizing the litigant's argument in *Felixstowe* as a red herring).

n20 It may be possible, for example, to use the new person view to substitute a federal rule for relevant state law analysis. In *Bank of New England v. Klein*, 86 B.R. 897 (Bankr. S.D. Tex. 1988), Klein signed a guaranty of indebtedness from the debtor to a bank. The debtor filed for bankruptcy, became a debtor in possession, and subsequently received more loans from the bank. When the postpetition loans went unpaid, the bank sought to recover from Klein under the guaranties. The court held that Klein had only guaranteed the pre-petition loans, relying on both the new entity view and state law. According to the court, the debtor and debtor in possession acted and were treated as distinct entities. Analogizing the dispute here to the issue of set-off rights under the new entity view, the court held that Klein did not secure the post-petition debts. *Id.* at 899-900. Furthermore, the guaranty was governed by Massachusetts law which states that if there is a material change in circumstances, a surety may be absolved of its obligations. *Id.* at 900. See also *In re SEACO Inc.*, 82 B.R. 821 (Bankr. E.D. La. 1987).

n21 See generally Vern Countryman, *Executory Contracts in Bankruptcy*, 57 MINN. L. REV. 439 (1973).

n22 See *infra* note 32. See also 11 U.S.C. section 1103(c) (1988) (granting power to committees to meet and consult with trustee or debtor in possession); section 1104 (1988) (cause to appoint a trustee); section 1106 (1988) (setting out duties of trustee); section 1107 (1988) (setting out duties of debtor in possession).

n23 See, e.g., 11 U.S.C. Special Tax Provision section 346 (1988).

n24 I.R.C. section 1 et seq. (1988).

n25 See, e.g., I.R.C. section 1398 (1988 & Supp. V 1993); section 1399 (1988); section 368(a)(1)(G) (1988 & Supp. V 1993).

n26 See, e.g., I.R.C. sectionsection 1398, 1399 (1988).

n27 Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544 (repealed 1978) [hereinafter Bankruptcy Act].

n28 See infra note 29.

n29 "The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located" Bankruptcy Act section 70.

n30 "Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all title and exercise all the powers of a trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe." Bankruptcy Act section 342.

n31 11 U.S.C. section 541 (1988 & Supp. V 1993).

n32 See, e.g., 11 U.S.C. section 541 (1988 & Supp. V 1993) (describing which property becomes part of the estate); section 362 (1988 & Supp. V 1993) (staying various actions that affect property of the estate); section 522 (1988 & Supp. V 1993) (providing that an individual debtor may exempt certain types of property from the estate); section 363 (1988) (providing conditions under which the trustee may use, sell, or lease property of the estate); section 726 (1988) (distribution of property of the estate); section 1123 (1988) (providing for treatment of property of the estate under a plan of reorganization).

n33 See *United States v. Verlinsky*, 459 F.2d 1085, 1088 (5th Cir. 1972) (stating that "title had actually passed to the Trustee the day the petition was filed, 11 U.S.C.A. section 110(a)," without further explanation).

The strongest arguments for the new person view appear in the works of academic commentators. See Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845 (1988) [hereinafter, Andrew, *Understanding Rejection*]; Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. COLO. L. REV. 1 (1991) [hereinafter Andrew, *A Reply*]; Donald P. Board, *Retooling "A Bankruptcy Machine That Would Go of Itself,"* 72 B.U. L. REV. 243, 260-63 (1992) (reviewing DOUGLAS G. BAIRD & THOMAS H. JACKSON, *CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY* (1990)); Paul B. Geilich, *Essentials of Bankruptcy Tax Law*, 66 AM. BANKR. L. J. 323 (1992); Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717 (1991).

n34 11 U.S.C. section 541(a) (1988).

n35 11 U.S.C. section 323(a) (1988).

n36 Board, *supra* note 33, at 260-61.

n37 *Id.* at 262.

n38 *Id.*

n39 11 U.S.C. section 541(a) (1988).

n40 11 U.S.C. section 1101(1) (1988).

n41 See *supra* note 30, and *infra* note 51.

n42 11 U.S.C. section 323 (1988).

n43 UNIF. PROBATE CODE section 1-201(11) (1975) (defining estate to include property of decedent; adopted in fifteen jurisdictions).

n44 See, e.g., *Nicholas v. United States*, 384 U.S. 678, 692 (1966) (referring to a bankruptcy trustee as "representative of the bankruptcy estate"); *Hood v. Brownlee*, 62 F.2d 675, 676 (4th Cir. 1933); *In re Rothschild*, 154 F. 194, 195 (2nd Cir. 1907); *Ayres v. Cone*, 138 F. 778, 783 (8th Cir. 1905); *In re Wingert*, 16 F. Supp. 875 (D. Mass. 1936).

n45 11 U.S.C. section 101(41) (1988 & Supp. II 1990).

n46 11 U.S.C. section 101(15) (1988 & Supp. II 1990).

n47 A consequence of this definition is that only a "person," and not entities such as estates and trusts, is eligible to file for bankruptcy. 11 U.S.C. section 109(a) (1988).

n48 11 U.S.C. section 349(b)(3) (1988). See Board, *supra* note 33, at 261 n.85.

n49 11 U.S.C. section 1141(b)(3) (1988). See Board, *supra* note 33, at 261 n.86.

n50 11 U.S.C. section 1123(a)(5)(A) (1988). See Board, *supra* note 33, at 261 n.86.

n51 See Bankruptcy Act section 70, 188. See also 6 COLLIER ON BANKRUPTCY 1 8.10 at 1412-13 (14th ed. 1978).

n52 See 8 COLLIER ON BANKRUPTCY 1 6.31 at 927-28 (14th ed. 1978).

n53 See *supra* note 51.

n54 11 U.S.C. section 553 (1988 & Supp. II 1990).

n55 4 COLLIER ON BANKRUPTCY 1 553.04 AT 553-22-24 (15TH ED. 1994).

n56 Some courts relied on the new entity doctrine to hold that there was no mutuality because the estate or debtor in possession was a different entity than the debtor. See *In re Evatt*, 112 B.R. 405 (Bankr. W.D. Okla. 1989), *aff'd*, *United States v. Evatt (In re Evatt)*, 112 B.R. 417 (W.D. Okla. 1990); *Walat Farms, Inc. v. United States (In re Walat Farms, Inc.)*, 69 B.R. 529 (Bankr. E.D. Mich. 1987); *In re Braniff Airways, Inc.*, 42 B.R. 443 (Bankr. N.D. Tex. 1984). The Eighth Circuit has recently declined to follow this approach for the

purposes of mutuality, although it did not address the new person view in general, see *supra* note 7. See also Richard Sauer, *Special Problems of Banks With Bankruptcy Debtor Customers*, 61 AM. BANKR. L.J. 95 (1987). "Likewise, because the filing of a bankruptcy petition creates a 'new entity' in the bankruptcy case, any attempt to offset a prepetition debit against a post-petition credit or vice versa, will be improper as involving different parties. This requirement that debit and credit 'arose before the commencement of the case' may therefore be seen as redundant." *Id.* at 97 (citations omitted).

n57 Adherence to the new person view also creates problems with otherwise clear language of section 1108 of the Code. One court viewed the reference in section 1108 to the "debtor's business" as technically nonsensical because after the commencement of the case, the debtor's business would no longer exist. Rather, it would be the estate's business, managed by the debtor in possession. In *re Curlew Valley Assoc.*, 14 B.R. 506, 509 (Bankr. D. Utah 1981). See also *Clenenden v. Van Dyk (In re ByRite Distrib.)*, 89 B.R. 906, 910 (Bankr. D. Utah 1988). Under the property approach, this problem would not exist, since the debtor in possession's business would be the debtor's business.

n58 See, e.g., *Shine v. Shine*, 802 F.2d 583, 587 (1st Cir. 1986) (describing the "harried and hurried atmosphere" in which the Code was put into final form and enacted). In *Shine*, the court noted that the provision at issue became mangled through careless redrafting, and that its literal reading is quite different than intended. For a discussion of an example where the legislative process resulted in legislative history contrary to the actual Code provision enacted, see Stephen M. McJohn, *The Flip Side of Twist Cap: Letters of Credit as Executory Contracts in Bankruptcy*, 38 WAYNE L. REV. 1379, 1406-08 (1992).

n59 The legislative history clearly states at one point that the property of the estate remains vested in the debtor, as the property view mandates. "section 541 of the code does not transfer title out of the debtor as did section 70a of the Bankruptcy Act." FED. R. BANKR. P. 3020 advisory committee's note, reprinted in *COLLIER'S BANKRUPTCY RULES* Pt.2 (Lawrence King ed. 1991-92). See also Board, *supra* note 33, at 261 n.86 (noting that such legislative history is contrary to the new person view and attempting to explain how its drafters may have been mistaken).

However, the legislative history in another areas seems contrary to the property view. "Once the estate is created, no interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from the estate or acquired by the debtor after commencement of the case and not included as property of the estate will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue in rem with respect to property of the estate, and the discharge will apply in personam to relieve the debtor, and thus his probate representative, of liability for dischargeable debts." S. REP. NO. 989, 95th Cong. 2d Sess. 83. Yet this statement apparently applies only to individual bankruptcies, not to corporate bankruptcies where the issue is more pointed. For a recent discussion regarding the hazards of determining the intent behind a statute given conflicting views of the drafters, see Paul F. Campos, *The Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993).

n60 These weaknesses are discussed *infra* Parts II-IV.

n61 For a discussion and analysis of the tax aspects of bankruptcies, see Mark A. Frankel, *Federal Taxation of Corporate Reorganization*, 66 AM. BANKR. L.J. 55

(1992) (analyzing the taxation of corporate reorganizations in bankruptcy, including treatment of cancellation of indebtedness income, tax free reorganizations, and net operating losses). See also Geilich, *supra* note 33.

n62 For a clear and succinct exposition of the fundamental structures of corporate taxation, see HOWARD E. ABRAMS & RICHARD L. DOERNBERG, *FEDERAL CORPORATE TAXATION* (1990) [hereinafter ABRAMS & DOERNBERG].

n63 *Id.* at 20-43.

n64 I.R.C. section 1001 (1988).

n65 See ABRAMS & DOERNBERG, *supra* note 62, at 20-43; BORIS BITTKER & JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* 14.01, at 14-3 (15th ed. 1987).

n66 See Frankel, *supra* note 61, at 60-62 n.32-41.

n67 I.R.C. section 368(a)(1)(G), 381(a) (1988).

n68 11 U.S.C. section 502 (1988).

n69 I.R.C. section 382 (1988), 361 (1988 & Supp. V 1993); 11 U.S.C. section 346(c), (g) (1988).

n70 I.R.C. section 1399 (1988).

n71 Indeed, even if the bankrupt corporation's property is transferred to a liquidating trust, the trustee must file tax returns and pay taxes on behalf of the corporation. See *Holywell Corp. v. Smith*, 112 S. Ct. 1021, remanded, 965 F.2d 994 (1992) .

n72 See I.R.C. section 381- 82 (1988 & Supp. V 1993) (setting out the circumstances under which one may succeed to a predecessor's tax attributes).

n73 I.R.C. section 1012 (1988 & Supp. V 1993).

n74 See *supra* note 72. A sale, such as the one described here, does not fit within the legislative criteria required for a transfer of tax attributes with assets.

n75 I.R.C. section 368(a)(1)(G) (1988). See also Frankel, *supra* note 61, at 72-82.

n76 Frankel, *supra* note 61, at 77-80.

n77 *Id.*

n78 *Id.*

n79 See *infra* notes 241-45 and accompanying text.

n80 I.R.C. section 382 (1988 & Supp. V 1993).

n81 See Frankel, *supra* note 61, at 82-92. See also Joni Larson, *The Bankruptcy Court Overlooks Tax Laws in In re Prudential Lines, Inc.: An NOL Should Not Be Property of a Bankruptcy Estate*, 29 WILLAMETTE L. REV. 23 (1993); Michelle

Arnopol, *Why Have Chapter 11 Bankruptcies Failed So Miserably? A Reappraisal of Congressional Attempts to Protect a Corporation's Net Operating Losses After Bankruptcy*, 68 NOTRE DAME L. REV. 133 (1992). For a discussion on the treatment of net operating losses in connection with bankruptcy, see Kenneth J. Malek and William R. Thomas, *New 382(1)(5) and (1)(6) Regulations Provide Relief in Certain Corporate Bankruptcy Restructurings*, 70 TAXES 715-33 (November 1992).

n82 See I.R.C. section 382(1)(5) (1988 & Supp. IV 1992).

n83 See Frankel, *supra* note 61, at 85-92.

n84 Such limits are calculated by taking the value of Corporation A and determining how much income would have been generated in future years by investing that amount in tax exempt bonds. See Frankel, *supra* note 61, at 85-88.

n85 I.R.C. section 382 (c) (1988). See also Frankel, *supra* note 61, at 88-89.

n86 Frankel, *supra* note 61, at 90-92.

n87 11 U.S.C. section 522 (1988 & Supp. III 1991).

n88 11 U.S.C. section 541(a)(6) (1988).

n89 I.R.C. section 6012(a)(9), (b)(4) (1988).

n90 See 11 U.S.C. sectionsection 523 (1988 & Supp. V 1993), 524 (1988), 727 (1988).

n91 11 U.S.C. sectionsection 727(a) (1988), 1141(d)(3) (1988).

n92 I.R.C. section 1389 (1988).

n93 See I.R.C. section 1399 (1988). Indeed, the individual debtors under chapter 13 similarly do not become a separate tax entity.

n94 11 U.S.C. section 346(i) (1988 & Supp. V 1993).

n95 *Id.*

n96 See *supra* notes 87-89 and accompanying text.

n97 See *supra* note 90.

n98 I.R.C. section 61(a)(12) (1988).

n99 I.R.C. section 108 (1988 & Supp. V 1993).

n100 See Andrew, *Understanding "Rejection,"* and Andrew, *A Reply*, *supra* note 33. These articles, together with Westbrook, *supra* note 19, have significantly clarified the area of executory contract law in bankruptcy.

n101 "The trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. section 365(a) (1988).

n102 See *Central Trust Co. v. Chicago Auditorium Ass'n.*, 240 U.S. 581 (1916); *In re Lathrie*, 61 F.2d 37 (9th Cir. 1932); *Watson v. Merrill*, 136 F. 359 (8th Cir.

1905). For a discussion of the historical development of executory contract doctrine, see Andrew, Understanding "Rejection," *supra* note 33, at 856-900; Countryman, *supra* note 21.

n103 See *supra* note 101.

n104 The trustee's power to abandon is now set forth in section 554 of the Code. To the extent that the Supreme Court has touched on issues relating to the legal nature of the bankruptcy estate, the Court's approach has been generally consistent with the property approach as discussed in respect to the *Bildisco* and *Weintraub* cases. See *infra* notes 117-129, 133, 173-78 and accompanying text. A similar approach could have avoided some difficulties the Court had in dealing with abandonment issues. In *Ohio v. Kovacs*, 469 U.S. 274 (1985), the Court did not address the case in terms of the legal nature of the estate, although it implicitly seemed to follow the new person approach. Stating in dicta that the trustees could simply abandon property subject to environmental clean-up obligations, the Court implied that such property would then return to the debtor corporation. *Id.* at 285 n.12. This would give the estate a power that would not exist outside of bankruptcy - the ability to escape obligations by declaring property abandoned. See Theodore Eisenberg, Bankruptcy in the Administrative State, 50 LAW & CONTEMP. PROBS. 3 (1987). In *Midatlantic Nat'l Bank v. N. J. Dep't of Env'tl. Protection*, 474 U.S. 494 (1986), the Court retreated from the *Kovacs* dicta and held that the trustee's duty to follow environmental laws precluded abandonment in that case. Unfortunately, the opinion left very unclear the scope of such duties generally. The property approach would have avoided this confusion. Because the debtor and the estate would not be separate persons, there would be no available shell to hold property subject to environmental or other liabilities. Rather, the issue would be governed by the relevant state or federal laws. See Westbrook, *supra* note 19, at 235.

n105 Westbrook, *supra* note 19, at 235. See also *Chicago Auditorium Ass'n.*, 240 U.S. 581 (1916).

n106 See Westbrook, *supra* note 19, at 235.

n107 *Id.*

n108 "The trustee shall assume or reject an executory contract, including unexpired leases of real property . . . within sixty days after adjudication . . ." Bankruptcy Act section 70b, as amended by Chandler Act of 1938, Pub. L. No. 75-696, 52 Stat. 575. Similar provisions appeared in the chapters governing corporate reorganizations. See Bankruptcy Act section 116(1), 313(1) (1976).

n109 11 U.S.C. section 365 (1988 & Supp. V 1993).

n110 519 F.2d 698 (2d Cir. 1975). See also *In re Brada Miller Freight System, Inc.*, 702 F.2d 894-96 (11th Cir. 1983) (stating that debtor in possession is a new entity for some but not all purposes).

n111 Kevin Steel, 519 F.2d at 706.

n112 *Id.* at 700.

n113 29 U.S.C. section 1 et seq. (1988).

n114 Kevin Steel, 519 F.2d at 702.

n115 Id. at 704.

n116 Id.

n117 465 U.S. 513, 527-28 (1984).

n118 Id. at 518-19.

n119 Id. at 517.

n120 Id. at 518.

n121 Id. at 519.

n122 Id. at 521.

n123 Id. at 520-21.

n124 Id.

n125 Id. at 534.

n126 Id. at 528-29 (citations omitted).

n127 Id. at 532-33.

n128 Id. at 529-31.

n129 Id. at 532.

n130 See Andrew, Understanding "Rejection," and Andrew, A Reply, supra note 33; Westbrook, supra note 19.

n131 Andrew, A Reply, supra note 33, at 19-21.

n132 Id. at 855 n.51 (citations omitted).

n133 Bildisco, 465 U.S. at 528.

n134 Id.

n135 For a discussion addressing several issues arising in regard to post-petition executory contracts in the wake of Bildisco, see Douglas W. Brodewieck, The Postpetition, Pre-Rejection, PreAssumption Status of an Executory Contract, 59 AM. BANKR. L.J. 197 (1985).

n136 Bildisco, 465 U.S. at 531.

n137 11 U.S.C. section 362 (1988 & Supp. V 1993).

n138 Cf. Cohen v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.), 138 B.R. 687 (Bankr. S.D.N.Y. 1992) (declining to follow the reasoning of Andrew, the courts that applied an exclusionary approach followed Westbrook's functional approach). The Ninth Circuit applied an exclusionary approach in holding that the estate was not liable under a contract

until it was assumed. See *Cheadle v. Appleatchee Riders Ass'n (In re Lovitt)*, 757 F.2d 1035, 1041 (9th Cir.), cert. denied, 474 U.S. 849 (1985). As with the new person approach generally, the court acted too broadly; it could have held that until assumption, the nonbankrupt party only had a prepetition claim against the estate. Indeed, the Ninth Circuit subsequently adopted the functional approach in order to hold that the automatic stay prevented the nonbankrupt party from terminating an executory contract before it had been assumed or rejected. See *Computer Communications, Inc. v. Codex Corp. (In re Computer Communications, Inc.)*, 824 F.2d 725, 729 (9th Cir. 1987).

n139 See *Chicago Bd. of Trade v. Johnson*, 264 U.S. 1, 12 (1924).

n140 Declining to use the simplistic analysis offered by the new person view, the Third Circuit rejected the new entity theory by holding that the trustee was bound by a pre-bankruptcy arbitration clause. The trustee brought a non-core adversary proceeding against the debtor's broker seeking recovery for securities fraud on various state and federal law theories. *Hays and Co. v. Merrill Lynch, Inc.*, 885 F.2d 1149, 1153 (3d Cir. 1984). See also Zach Zunshine, Note, Pre-Petition Arbitration Agreements in Bankruptcy and *Hays and Co. v. Merrill Lynch*, 7 OHIO ST. J. DISP. RES. 157 (1991).

n141 See Melanie K. Palmore, Comment, "Insured vs. Insured" Exclusions in Director and Officer Liability Insurance Policies: Is Coverage Available When Chapter 11 Trustees and Debtors-In-Possession Sue Former Directors and Officers, 9 BANKR. DEV. J. 101 (1992).

n142 Id. at 102-03.

n143 Id.

n144 Id. at 103-04.

n145 See Westbrook, *supra* note 19, at 328. Although Westbrook does not reject the new person view generally, he does reject it as a basis for analyzing executory contract issues. Westbrook's approach to the problems of executory contracts illustrates the sort of analysis that rejecting the new person view would promote in bankruptcy. Rather than utilizing the bankruptcy-specific new person view, Westbrook looks to more general principles to provide a foundation for the right to reject or assume executory contracts. Under his approach, the trustee's power to reject executory contracts is analogous to the power that every person has to breach a contract. Id. at 324-25. Thus, upon the commencement of a bankruptcy, an executory contract becomes property of the estate like the rest of the debtor's property. If the trustee elects to reject the contract, this constitutes breach of the contract, just as the Code provides. See 11 U.S.C. section 365(g) (1988). Similar to the other creditors, the remedy of the party not in breach is a claim in the bankruptcy proceeding. Thus, both Westbrook and the property view force the analysis to rely on existing rules, rather than foreclosing the argument with a special bankruptcy shortcut.

n146 One case rejected an argument based on the new person view that would have allowed debtors to shed some obligations under executory contracts. In *In re St. Louis Globe-Democrat*, 86 B.R. 606 (Bankr. E.D. Mo. 1988), employees of the debtor had contractual entitlements to bonuses based on length of employment. The court rejected the argument that because the debtor in possession was a new and separate entity, post-petition bonuses should be computed only from the time of the commencement of the bankruptcy, when the employment with the new entity

began. The court wrote that this argument "must rest, if at all, on the discredited theory that a Chapter 11 debtor is a wholly new entity and that, therefore, the employment relation commenced anew with the filing of this case." Id. at 608.

n147 11 U.S.C. section 365(c)(2) (1988 & Supp. V 1993). Section 365 also bars assumption of certain personal contracts. See supra note 7.

n148 See, e.g., U.C.C. section 2-210.

n149 The trustee may not assume an executory contract if "applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegations of duties." 11 U.S.C. section 365(c)(1)(A) (1988).

n150 "Where an executory contract is of such a nature as to be based upon personal services or skills, or upon personal trust or confidence, the trustee has traditionally been unable to assume or assign the rights of the bankrupt in such a contract." 2 COLLIER ON BANKRUPTCY 1 365.05, at 36544 (15th ed. 1994).

n151 See supra note 33.

n152 11 U.S.C. section 365(c)(1)(A) (1988).

n153 See infra note 155.

n154 11 U.S.C. section 365(c)(1)(A) (1988).

n155 See, e.g., *In re Hartec Enter., Inc.*, 117 B.R. 865, 869 (Bankr. W.D. Tex. 1990), vacated on other grounds, 130 B.R. 929 (W.D. Tex. 1991), dismissed, 130 B.R. 930 (Bankr. W.D. Tex. 1991) (holding that section 365 does not apply any limitations to personal service contracts and consequently applies to personal contracts of the debtor). But see *In re Western Elec., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) (holding that debtor in possession may not assume a personal contract of the debtor because they are "materially different entities").

n156 64 B.R. 156 (Bankr. C.D. Cal. 1986).

n157 Id. at 154.

n158 Consistent with the new person view, the court created a new legal person, the debtor in possession, to represent the estate of the debtor. Id. at 159.

n159 Id. at 158 (quoting *In re Bofill*, 25 B.R. 550, 552 (Bankr. S.D.N.Y. 1982)).

n160 Id. at 159.

n161 Id. at 158.

n162 Id. at 160.

n163 Id.

n164 913 F.2d 102 (3d Cir. 1990).

n165 Id. at 104-05.

n166 Id.

n167 Id. at 103.

n168 Id. at 106. Now, the "appellant has a claim against the debtor's estate for whatever damages the rejection/breach has occasioned." Id. at 107.

n169 I am indebted to Guyora Binder for sorting out this seeming contradiction.

n170 11 U.S.C. section 521 (1988).

n171 11 U.S.C. section 1106, 1107 (1988).

n172 The new person view has also served as an argument to shed obligations in this context as well, see *supra* note 146. For a debtor in possession, a general partner, unsuccessfully contending that it was a new entity not bound by the debtor's duty of good faith and fair dealing to other partners, see *Wash. Medical Ctr. v. Holle*, 573 A.2d 1269 (D.C. App. 1990).

n173 722 F.2d 338 (7th Cir. 1983), *rev'd*, 471 U.S. 343 (1985).

n174 *Weintraub*, 471 U.S. at 343.

n175 Id. at 352-53.

n176 Id. at 349.

n177 Id. at 353.

n178 Id. at 352-53. As with *Bildisco*, some lower courts have read the *Weintraub* holding narrowly, continuing to consider the debtor in possession to be a new entity with respect to a closely related issue: the employment of counsel. See, e.g., *In re Envirodyne Indus.*, 150 B.R. 1008, 1021 (Bankr. N.D. Ill. 1993); *In re Yablon*, 136 B.R. 88, 93 (Bankr. S.D.N.Y. 1992).

n179 See *infra* notes 190-246 and accompanying text.

n180 The new person theory also introduces unnecessary complications into the analysis of the effect of bankruptcy on a corporation subject to a regulatory regime. For discussions of bankruptcy and regulated industries, see Robert K. Rasmussen, *Bankruptcy and the Administrative State*, 42 HASTINGS L.J. 1567 (1991) (attempting to adapt the prevailing theory of bankruptcy, which is concerned mainly with private law, to incorporate consideration of the public law policies of administrative law, and to create a framework to guide whether disputes involving a corporation in bankruptcy should be decided by the bankruptcy court or administrative agency); Theodore Eisenberg, *Bankruptcy and the Administrative State*, 50 LAW & CONTEMP. PROBS. 3 (1987) (discussing the possible benefits of the bankruptcy regime in the regulation of financially distressed utilities). If the estate is a new person, it would be a successor entity to the debtor, thus possibly not subject to any effects of the debtor's prior regulatory history, even if the debtor remained in possession. This is exactly the sort of short-cut argument that failed in *Bildisco* - that the estate could claim to be a new entity, free from all of the debtor's statutory obligations. See also *Ravenna Indus. v. Ohio Bureau of Workers' Compensation (In re A.C. Williams Co.)*, 51 B.R. 496 (Bankr. N.D. Ohio 1985) (considering and rejecting the theory that a

debtor in possession is a new entity so that the state workers' compensation agency could not use debtor's claims history in computing its premiums).

n181 30 B.R. 490 (Bankr. 9th Cir. 1983).

n182 Id. The position that bankruptcy effectively suspends corporate powers would also represent a change in the previous understanding of the relation between bankruptcy and the laws of corporations. The "great weight of authority is to the effect that adjudication in bankruptcy does not dissolve a corporation nor suspend the right of the corporation to elect officers or take corporate action." FLETCHER CYCLOPEDIA CORPORATIONS section 7657.

n183 See 11 U.S.C. section 365(c)(2) (1988 & Supp. V 1993).

n184 Farmer, 30 B.R. at 495.

n185 11 U.S.C. section 541(c) (1988 & Supp. V 1993).

n186 11 U.S.C. section 521 (1988).

n187 11 U.S.C. section 1142(b) (1988).

n188 For a case decided under a previous bankruptcy statute holding that a bankrupt corporation's name was not property of the estate that would be distributed to creditors, see Theobald-Jansen Elec. v. Wood Elec., 285 F. 29 (6th Cir. 1922).

n189 The new person approach would also require special rules for individual bankruptcies because a bankruptcy trustee could surely not succeed to all the powers that an individual has at the time of her bankruptcy. For example, an individual's right to control the privilege with respect to prebankruptcy communications with her attorney would otherwise pass to the trustee, a result absurd on its face.

n190 See *infra* notes 191-93. The fiduciary duties where the debtor is out of possession and a trustee is in place have received little attention from courts or commentators, presumably because the issue has little practical importance. I will concentrate here on the debtor in possession situation. Much of the analysis would similarly apply in trustee cases.

n191 The court in Weintraub stated that "the fiduciary duty of the trustee runs to shareholders as well as to creditors." Weintraub, 471 U.S. at 355. See *Pepper v. Litton*, 308 U.S. 295, 310-11 (1939) (disallowing claim against debtor corporation gained by the dominant shareholder in a closely held corporation in breach of the fiduciary duty owed to the corporation by the shareholder). See also Lewis U. Davis et al., *Corporate Reorganization in the 1990's: Guiding Directors of Troubled Corporations Through Uncertain Territory*, 47 BUS. LAW. 1, 20-21 (1991). One suggestion has been that this fiduciary duty be implemented by imposing a duty on the management to auction the corporation to the highest bidder, just as state corporate law may impose a Revlon duty to auction the company when the company has either begun an active bidding process or taken action that will lead to the dissolution or break-up of the corporate entity. See Erica M. Ryland, *Bracing for the "Failure Boom": Should A Revlon Auction Duty Arise in Chapter 11?*, 90 COLUM. L. REV. 2255, 2267 (1990) (arguing for application in chapter 11 of the duty imposed by *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986)).

n192 See *Henderson v. Buchanan*, 985 F.2d 1021, aff'd *Henderson v. Buchanan* (In re W. World Funding), 52 B.R. 743, 763 (Bankr. D. Nev. 1985) ("When a corporation is insolvent fiduciary duties run to creditors."). See also Martin J. Bienenstock, *Conflicts Between Management and the Debtor in Possession's Fiduciary Duties*, 61 U. CIN. L. REV. 543, 556-58 (1992).

n193 See, e.g., Bienenstock, *supra* note 192, at 556 n.49; Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PENN. L. REV. 669, 781-96 (1993) (proposing that management should be required to adopt the strategy that would maximize the value of the company's assets); Stephen H. Case, *Fiduciary Duty of Corporate Directors and Officers, Resolution of Conflicts Between Creditors and Shareholders, and Removal of Directors by Dissident Shareholders in Chapter 11 Cases*, ALI-ABA COMM CONTINUING PROF. EDUC., THE WILLIAMSBURG CONF. ON BANKR.: CRITIQUE OF THE FIRST DECADE UNDER THE BANKRUPTCY CODE AND AGENDA FOR REFORM 373, 373-413 (1988) (proposing that management adopt and then publicly announce a pro-equity, pro-creditor, or neutral stance).

n194 Raymond T. Nimmer & Richard B. Feinberg, Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity, 6 BANKR. DEV. J. 1 (1989).

n195 *Id.* at 20-21.

n196 *Id.*

n197 *Id.* at 23.

n198 *Bildisco*, 465 U.S. at 528.

n199 11 U.S.C. section 1101(1) (1988).

n200 Nimmer & Feinberg, *supra* note 194, at 20-23.

n201 *Id.* at 23.

n202 *Id.* at 25.

n203 *Id.*

n204 *Id.* at 23.

n205 *Id.*

n206 *Id.* at 24.

n207 See *supra* note 192.

n208 Nimmer & Feinberg, *supra* note 194, at 32.

n209 *Id.*

n210 Thomas G. Kelch, *The Phantom Fiduciary: The Debtor in Possession in Chapter 11*, 38 WAYNE L. REV. 1323 (1992); contra John T. Roache, Note, *The Fiduciary Obligations of a Debtor in Possession*, 1993 U. ILL. L. REV. 133 (1993) (advocating a higher standard of fiduciary duty for a debtor in possession than courts have required).

n211 Kelch, *supra* note 210, at 1363.

n212 *Id.* at 1335-45.

n213 *Id.* at 1345.

n214 See, e.g., *Unsecured Creditors' Comm. v. Noyes (In re STN Enter.)*, 779 F.2d 901, 904 (2d Cir. 1985) (stating that directors of an insolvent corporation have a fiduciary duty to the creditors); *FDIC v. Sea Pines Co.*, 692 F.2d 973, 976-77 (4th Cir. 1982) (holding that "when the corporation becomes insolvent, the fiduciary duty of the directors shifts from the stockholders to the creditors."), cert. denied, 461 U.S. 928 (1983); *Clarkson Co. v. Shaheen*, 660 F.2d 506, 512 (2d Cir. 1981) (finding that directors' fiduciary duties arise upon insolvency, and not only if liquidation is imminent), cert. denied, 455 U.S. 990 (1982); *Burroughs v. Fields*, 546 F.2d 215, 218 (7th Cir. 1976) (holding that payment of money to president of debtor corporation was a fraudulent conveyance where president used powers to prefer his position over creditors despite a fiduciary duty owed them).

n215 See, e.g., Harvey R. Miller, *Corporate Governance in Chapter 11: The Fiduciary Relationship between Directors and Shareholders of Solvent and Insolvent Corporations*, 23 SETON HALL L. REV. 1467 (1993); Harvey R. Miller et al., *The Chapter 11 Players in Contemporary Bankruptcy Practice: Roles, Obligations, and Ethical Considerations of Debtors in Possession, Trustees, Examiners and Committees*, 668 PLI/COMM. 371 (1993).

n216 Kelch, *supra* note 210, at 1345.

n217 *Id.*

n218 *Id.* at 1363.

n219 *Id.* at 1350-52.

n220 *Id.* at 1353-54.

n221 *Id.*

n222 *Id.* at 1364.

n223 *Id.*

n224 *Id.* at 1366-67.

n225 *Id.* at 1367.

n226 *Id.* at 1366.

n227 *Id.* at 1370.

n228 *Id.* at 1368-71.

n229 See *supra* notes 190-93 and accompanying text.

n230 Kelch, *supra* note 210, at 1334.

n231 Id.

n232 Id.

n233 Id. at 1329-30.

n234 11 U.S.C. section 1129(b) (1988).

n235 11 U.S.C. section 363, 1107 (1988).

n236 11 U.S.C. section 1121(b) (1988).

n237 See *infra* note 286 and accompanying text.

n238 See *Manville v. Equity Sec. Holders Comm.* (In re *Johns-Manville Corp.*), 801 F.2d 60 (2d Cir. 1986) (following the rule that shareholders retain the right to elect directors absent a showing of clear abuse); *Haugh v. Indus. Inc. Check* (In re *Public Serv. Holding Corp.*), 141 F.2d 425 (2d Cir. 1944) (holding that while shareholders of a debtor corporation may hold an annual meeting during pendency of the petition, such a right is not absolute); *In re J.P. Linahan, Inc.*, 111 F.2d 590 (2d Cir. 1940); *Van Siclen v. Bush* (In re *Bush Term. Co.*), 78 F.2d 662 (2d Cir. 1935) (holding shareholders retained right to elect directors during bankruptcy). See also Mark E. Budnitz, Chapter 11 Business Reorganizations and Shareholder Meetings: Will the Meeting Please Come to Order, or Should the Meeting be Cancelled Altogether?, 58 GEO. WASH. L. REV. 1214 (1990); Anna Y. Chou, Corporate Governance in Chapter 11: Electing A New Board, 65 AM. BANKR. L. J. 559 (1991) (Examining cases under the Bankruptcy Act and the Code concluding that, contrary to *Manville*, bankruptcy should not abrogate the right of creditors under state corporate law to elect directors even if a threat of irreparable harm to the reorganization is shown. Rather, the parties opposing an election of directors should be required to seek appointment of a trustee); Michael A. Gerber, The Election of Directors and Chapter 11-- The Second Circuit Tells Stockholders to Walk Softly and Carry a Big Lever, 53 BROOK. L. REV. 295 (1987); NIMMER & FEINBERG, *supra* note 194; LoPucki & Whitford, *supra* note 193, at 695-96 (noting this rule with some skepticism about whether the standard of "clear abuse" has much content).

n239 David A. Skeel, Jr., The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases, 78 VA. L. REV. 461, 485-87 (1992). See also Thomas G. Kelch, Shareholder Control Rights in Bankruptcy: Disassembling the Withering Mirage of Corporate Democracy, 52 MD. L. REV. 264 (1993) (proposing that either shareholders not be entitled to hold elections of directors, or that such elections be held only if the shareholders can make the sort of showing required of a creditor to lift of the automatic stay).

n240 Skeel, *supra* note 239, at 484-85.

n241 For a discussion of whether shareholders' rights in an insolvent corporation in bankruptcy should be extinguished before the confirmation of a plan of reorganization, see Lynn M. LoPucki & William C. Whitford, Preemptive Cram Down, 65 AM. BANKR. L.J. 625 (1991).

n242 Skeel, *supra* note 239, at 479 n.67 (citing Robert C. Clark, The Interdisciplinary Study of Legal Evolution, 90 YALE L.J. 1238, 1250-54 (1981)). Skeel states that in addition to effecting a sale of the bankrupt firm's assets, chapter 11 compromises the claims of most or all classes of claimants. Indeed, chapter 11 effects a sale of the bankrupt firm's assets in exchange for

compromising those claims; a confirmed plan of reorganization does both. This would emphasize the point that the sale of assets does not occur until the confirmation of the plan, not upon the filing of the bankruptcy petition.

n243 11 U.S.C. section 1129(b) (1988).

n244 A counterpart to whether shareholders can elect directors when the corporation is in bankruptcy is whether the directors can file a chapter 7 bankruptcy petition to liquidate a corporation if liquidation would require approval by shareholders outside of bankruptcy. See *In re Quarter Moon Livestock, Inc.*, 116 B.R. 775, 780 (Bankr. D. Idaho 1990) (stating that management could file a chapter 7 petition without shareholder approval). See also Shelby D. Green, "Reasonable Expectations" Define Board Power to Liquidate a Solvent Close Corporation in Bankruptcy, 41 *DRAKE L. REV.* 421 (1992).

n245 THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 153-56 (1986) (discussing post-petition torts).

n246 There have been a number of proposals to change chapter 11, ranging from minor adjustments, to abolishing chapter 11 bankruptcies, to abolishing bankruptcy in toto. For a recent critical discussion of some of the most notable proposed alternatives to chapter 11, see David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 *WIS. L. REV.* 465; Claire Finkelstein, *Financial Distress as a Noncooperative Game: A Proposal for Overcoming Obstacles to Private Workouts*, 102 *YALE L. REV.* 2205 (1993) (discussing proposed changes and suggesting use of a clause in debt agreements that would suspend the right of creditors to pursue their rights against the debtor in order to foster workouts).

Skeel has divided the proposed alternatives into four groups: (1) that the firm be auctioned to the highest bidder; (2) that the firm have a pre-planned bankruptcy structure which automatically distributes the debt and equity rights upon default; (3) that upon default, shareholders' interests are automatically cancelled and the next class of claimants succeed to such rights; (4) and that federal bankruptcy law be eliminated and resolution of the matter be left to state debt collection law. Skeel, at 473-77. Any of these, except the abolition of federal bankruptcy law, could be implemented using the new person or the property view. The same policies that support the property approach in chapter 11, however, would carry over to such proposals. Each would focus on maximizing the value of the assets while redeploying the rights to those assets, see *id.* at 473-74, so one would want to avoid any cleavage between the debtor and a new entity that caused a loss of value of the property. Likewise, such proposals should not permit a new entity to gain greater property rights than the debtor had.

n247 Probably the most thorough exposition of the economic approach is in JACKSON, *supra* note 245. See also Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 *U. CHI. L. REV.* 97, 100-01 (1984) (suggesting that the efficiency of bankruptcy laws depends upon the protection they afford the interests and assets of investors as a group rather than individuals); Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 *VA. L. REV.* 155, 155-56 (1989) (purporting that allocation of assets to creditors as a group maximizes wealth and is the "distributional goal" of bankruptcy).

n248 See James W. Bowers, *Groping and Coping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 MICH. L. REV. 2097 (1990); David G. Carlson, *Bankruptcy Theory and the Creditors' Bargain*, 61 U. CIN. L. REV. 453 (1992) [hereinafter Carlson, *Bankruptcy Theory*]. For criticism of the economic theory as a contractarian theory, see Theodore Eisenberg, *Commentary on "On the Nature of Bankruptcy": Bankruptcy and Bargaining*, VA. L. REV. 205, 205-07, 211-12 (1989) (arguing that non-bankruptcy results in the form of bargained settlements should be given equal weight as formal state law outcomes); Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541, 544-45 (1993) (asserting that Jackson's use of a "contractarian model to justify a normative principle of creditor wealth maximization" defies a coherent system of bankruptcy laws, but the problem is not in contractarianism, which may ultimately reveal the deep structure of bankruptcy). For a sharp criticism of the economic theory as mixing contractarianism and utilitarianism, see Carlson, *Bankruptcy Theory*. For a discussion of whether a utilitarian or contractarian model is more apt for bankruptcy law, see Anita F. Hill, *Bankruptcy, Contracts and Utilitarianism*, 56 MO. L. REV. 571 (1991) (concluding that a utilitarian theory is more valuable than a contractarian theory).

n249 See David G. Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341 (1987) (reviewing THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986)) (arguing that because the bankruptcy laws are the result of the work of thousands of individuals with various interests and not all working with the same single goal, the search for a deep structure in bankruptcy law is in vain and any jurisprudential explanation would have to be infinitely complex); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987) (viewing bankruptcy as dealing with too many issues to reduce to a single theory).

n250 Other scholars have criticized the economic model, but Korobkin has done the most toward developing an alternative to the economic model. See John D. Ayer, *So Near to Cleveland, So Far From God: An Essay on the Ethnography of Bankruptcy*, 61 U. CIN. L. REV. 407, 440-43 (1992) (discussing Korobkin's place in recent work in bankruptcy legal theory).

n251 Korobkin, *supra* note 248. Korobkin has further developed the theory of bankruptcy described in *Jurisprudence of Bankruptcy*, *supra* note 33, arguing that a contractarian theory of bankruptcy would lead to a "principle of rational planning," the attempt to promote the greatest part of the most important aims of those affected by the debtor's financial distress. See Korobkin, *supra* note 248, at 581. He appears to continue to rely on the new person approach. *Id.* at 546.

n252 Barry Adler has also proposed a theory of bankruptcy as an alternative to the economic theory. See Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311 (1993). Adler argues that the present form of bankruptcy law represents not just an attempt at economic efficiency, but also an adaptation to the political strength of many of the groups that benefit from an inefficient bankruptcy process, such as lawyers, corporate managers, and politicians. He suggests that without bankruptcy law, debtors and creditors could reach optimal agreements that would lead to the most efficient settlement of claims. *Id.* at 311-13. Because Adler focuses on the financial and political aspects of bankruptcy, rather than its legal forms, his theory does not address the legal nature of the bankruptcy estate.

n253 For the most complete statement of the economic theory, see JACKSON, *supra* note 245 (setting out the theory and using it to analyze and criticize existing

bankruptcy law). Although the economic theory has been revised a bit to take into account both the criticisms of the theory and bankruptcy case law, the relevant central idea described in the text remains. See Carlson, Bankruptcy Theory, *supra* note 248 (arguing that Jackson and Scott's changes in the economic theory fail to remedy the shortcomings of the theory).

n254 See Baird & Jackson, *supra* note 247, at 99-102.

n255 JACKSON, *supra* note 245, at 10 n.9.

n256 *Id.* at 21-67.

n257 *Id.* at 99-101, 112-13, 117, 156.

n258 See *supra* Part II.

n259 See *supra* Part III.

n260 See *supra* Part III.

n261 Korobkin, *supra* note 33, at 768.

n262 *Id.* at 745.

n263 See Douglas G. Baird, The Uneasy Case for Corporate Reorganizations, 15 J. LEGAL STUD. 127, 136-45 (1986) (expressing skepticism about whether chapter 11 is justifiable on economic grounds). Arguments that chapter 11 is economically inefficient and should be abolished or radically changed have been discussed both in leading law journals and daily newspapers. See, e.g., Michael Bradley & Michael Rosenzweig, The Untenable Case for Chapter 11, 101 YALE L. REV. 1043 (1992); Robert K. Rasmussen, Debtor's Choice: A Menu Approach to Corporate Bankruptcy, 71 TEX. L. REV. 51 (1992); Peter Passell, Critics of Bankruptcy Law See Inefficiency and Waste, THE NEW YORK TIMES, April 12, 1993, at A1, D10. See also Skeel, *supra* note 246.

n264 See Korobkin, *supra* note 33, at 721.

n265 *Id.* at 721-22.

n266 *Id.* at 745.

n267 *Id.* at 721-22.

n268 *Id.* at 769.

n269 *Id.* at 744-45.

n270 11 U.S.C. section 541 (1988 & Supp. V 1993).

n271 Korobkin, *supra* note 33, at 768.

n272 See IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980); Ian R. MacNeil, The Many Futures of Contract, 47 S. CAL. L. REV. 691 (1974).

n273 U.C.C. section 1-201(28) (1977).

n274 U.C.C. section 1-201(30) (1977).

n275 For a discussion on how persons who own property together may be considered partners under the tax laws, see ALAN GUNN, PARTNERSHIP INCOME TAXATION, 139-141 (1991).

n276 Korobkin, *supra* note 33, at 721-22.

n277 *Id.* at 768.

n278 *Id.*

n279 *Id.* at 739-55.

n280 Korobkin posits bankruptcy as a way to give a voice to those who have an interest in a corporation that is in financial distress. *Id.* at 746-47.

n281 Korobkin discusses in his analysis that many corporations in financial distress do not file for bankruptcy. They may be liquidated under state law or go through an out of court workout, but the possibility of bankruptcy influences the decisions of the parties. *Id.*

A notable recent proposal would extend the bankruptcy mechanism of shareholder committees to corporate governance generally. See John H. Matheson & Brent A. Olson, Corporate Law and the Longterm Shareholder Model of Corporate Governance, 76 MINN. L. REV. 1313 (1992).

n282 See Mark S. Kirschner et al., Prepackaged Bankruptcy Plans: The Development Tool of the '90s in the Wake of OID and Tax Concerns, 21 SETON HALL L. REV. 643, 645 (1991).

n283 Korobkin, *supra* note 33, at 724.

n284 11 U.S.C. sectionsection 705, 727 (1988).

n285 11 U.S.C. section 365 (1988 & Supp. V 1993); sectionsection 262, 554, 327 (1988).

n286 Thus, the property view looks to the purposes and effects of specific rules rather than to a formalistic rule devised to preclude more sophisticated legal analysis and force legal conclusions. The new person view has defects similar to another phantasmagoric bankruptcy theory, the two transfer theory. The two transfer theory appears to be on the wane after its rejection by the Seventh Circuit in the notable *Deprizio* decision. See *Levit v. Ingersoll Rand Finan. Corp.*, (In re V.N. *Deprizio Constr. Co.*), 874 F.2d 1186 (7th Cir. 1989); accord *In re C-L Cartage Co.*, 899 F.2d 1490 (6th Cir. 1990). The bankruptcy court in *Deprizio* used this analysis to hold that where there was a payment on a debt that had been guaranteed, the transfer of the money was really two transfers: the first being money from the debtor to the lender, and a separate transfer of money "for the benefit" of the guarantor. *In re Deprizio Constr. Co.*, 58 B.R. 478 (Bankr. N.D. Ill. 1986), rev'd, 86 B.R. 545 (N.D. Ill. 1988), aff'd in part & rev'd in part, *Levit v. Ingersoll Rand Finan. Corp.* (In re *Deprizio Constr. Co.*), 874 F.2d 1186 (7th Cir. 1989). This may or may not have led to a good conclusion, but it relies on a questionable doctrine. The two transfer theory at least had limited application. The new person view, on the other hand, performs similar feats on a larger scale. Avoiding tricks like the two transfer theory rule and the new person view will require bankruptcy analysis to be more frank

about its pragmatic nature.

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