SECURED LENDER RIGHTS IN 363 SALES AND RELATED ISSUES OF LENDER CONSENT

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INTRODUCTION

It is increasingly the case that restructuring proceedings are moving at an expedited pace, either through a pre-negotiated or pre-packaged plan process, or through expedited all-asset sales pursuant to section 363 of the Bankruptcy Code.[1] Indeed, in the past year, there has been a sharp spike in pre-packaged and pre-negotiated bankruptcies, the largest of which was CIT Group Inc.[2] In the last two years, there have also been some of the largest bankruptcy filings in history, including the cases of General Motors Corporation, Chrysler, LLC, and Lehman Brothers Holdings Inc., each involving expedited sale proceedings that resulted in the transfer of billions of dollars' worth of assets in just days or weeks.[3]

Although pre-packaged plans and 363 all-asset sales are not new concepts in chapter 11, the breadth and pace of such proceedings in recent history are raising interesting and challenging questions, particularly with regards to institutional secured lenders, who often are the parties most affected by these expedited bankruptcy cases. The focus of this article is to explore certain issues in the context of an all-asset sale under section 363(f) of the Bankruptcy Code, the provision that allows a debtor to sell its assets free of all liens and encumbrances, the related issue of credit bidding under 363(k), and how issues of consent by a syndicate of lenders are implicated in the process.

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[1] *See, e.g.*, 11 U.S.C. § 363(f) (2006) (permitting debtor to sell assets free and clear of any liens when certain conditions are met).

[2] *See* A. Joseph Warburton, *Understanding the Bankruptcies of Chrysler and General Motors: A Primer*, 60 SYRACUSE L. REV. 531, 568 (2010) (citing Mike Spector, *The Quickie Bankruptcy: More Companies Enter Court, and Exit, in a Flash*, WALL ST. J., Jan 5, 2010, at C1) (stating CIT Group Inc.'s 2009 pre-packaged bankruptcy was largest in history, yet took only forty days).

[3] *See* Marshall Huebner & Rajesh James, *Duties and Obligations of Officers and Directors in §363 Sales*, 28 AM. BANKR. INST. J., no. 10, Jan. 2010, at 36, 36 (noting prevalence of high-profile bankruptcies, including Lehman Brothers, Chrysler, and General Motors, using section 363 sales to sell assets early in their bankruptcies over past year); Warburton, *supra* note 2, at 533 (stating because Obama Administration opted for "quick and surgical" reorganization for Chrysler and GM, each filed for Chapter 11 bankruptcy protection on April 30, 2009 and June 1, 2009, respectively, and sold assets on June 10, 2009 and July 5, 2009, respectively).

I. SECTION 363(F): SALES FREE AND CLEAR OF LIENS AND OTHER INTERESTS

Long before the 1978 enactment of section 363(f) of the Bankruptcy Code, which provides for the sale of assets free and clear of interests under certain circumstances, it appears that there was a well-established bankruptcy policy against authorizing such a sale if there would be no surplus available to unsecured creditors. The decision whether to authorize a sale free and clear was within the discretion of the bankruptcy court, and appellate courts found that a bankruptcy court abused its discretion by authorizing a sale that would not yield a sale price exceeding secured claims and sale costs.[4] The usual justification for this policy was that pre-petition liens were not affected by the bankruptcy, and thus, where there would be no surplus from the sale of the property, the bankruptcy estate "should not be burdened with the costs and proceedings incident thereto."[5] Another stated rationale was that the lienholders themselves should not be subjected to unnecessary expenses.[6]

It is not clear whether this policy survived the enactment of section 363(f) of the Bankruptcy Code, as bankruptcy courts now frequently approve sales of assets for less than the face amount of the liens on the subject property, including the sale of whole operating businesses. Section 363(f) provides for the sale of property of the debtor "free and clear of any interest in such property of an entity other than the estate" if:

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

[4] *See, e.g.*, Hoehn v. McIntosh, 110 F.2d 199, 202 (6th Cir. 1940) (holding court abused discretion in ordering sale of property free from liens where it was not proven there was reasonable probability property would yield surplus over amount of liens); *See* Union Elec. Co. v. Hubbard (*In re* Mound City Coal Co.), 242 F. 248, 250 (4th Cir. 1917) (noting bankruptcy court would not ordinarily administer and liquidate assets, unduly burdening property or lien creditors themselves with cost of administration, unless there was surplus available to benefit general creditors).

[5] Fed. Land Bank of Baltimore v. Kurtz (*In re* Post), 70 F.2d 46, 47 (4th Cir. 1934).

[6] *See In re* Meyers, 24 F.2d 349, 351 (2d Cir. 1928) ("Finally, the mortgagee's share of the lien is not chargeable with the general expenses of administration of the estate, but only with a ratable proportion of the expenses of sale and of so much else as actually helped to preserve the property or its proceeds."); Seaboard Nat'l Bank v. Rogers Milk Prods. Co., 21 F.2d 414, 416–17 (2d Cir. 1927) ("Here a fund of $37,000 was realized from the mortgaged premises, and under the distribution which the receivers seek to sustain less than $10,000 of it is to be paid to the mortgage bondholders, although their bonds exceed many times the total fund. The rest is to be eaten up by expenses of administration, principally fees for receivers and attorneys. They are the only ones to profit by having sold the property under the receivership, instead of allowing the mortgage to be foreclosed in the usual manner. It is a shocking result, and such as justly brings receiverships into disrepute in the popular mind."); Aetna Life Ins. Co. v. Leonard, 186 F. 148, 149 (5th Cir. 1911) ("There is nothing in the record to show that it would be equitable or just to permit the large expenses of the receivership, or any part of it, to be used to lessen the security of the mortgagees. The mortgagees did not ask for the appointment of a receiver, nor does the record show that it was to their interest to have a receiver appointed."); *In re* Vulcan Foundry & Machine Co., 180 F. 671, 675 (3d Cir. 1910) (holding payment from sale proceeds, which were proceeds owed to secured creditors, could not be used to pay expenses of estate); *In re* Alcap Mfg. Co., 457 F. Supp. 1247, 1250, 1252 (D. Conn. 1978) (finding secured creditor could not be charged with expenses of estate from sale proceeds of secured creditor's collateral).

(2) such entity consents;
(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
(4) such interest is in bona fide dispute; or
(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[7]

The enactment of section 363(f) presumably was designed to balance the rights of secured creditors with the needs of a debtor to restructure its business, including the need to divest itself of assets.[8] Thus, while a debtor may sell its assets free of a secured lender's lien, section 363(f) limits the instances where that may occur in an effort to protect the secured lender's rights in the process.

A. 363(f)(2): Sales with the Consent of the Secured Lender

Clearly, a sale pursuant to section 363(f)(2) — by consent — is the ideal and the most straightforward way that a debtor can sell its assets free and clear of liens and other interests. In such instances, when all parties with an interest in the property have agreed to the terms of the sale, the debtor can proceed irrespective of the sometimes thorny legal issues that the sale may involve, as explored in greater detail below. However, as illustrated recently in the case *In re Chrysler LLC*,[9] in the context of a syndicate of lenders, what constitutes consent may be subject to challenge.[10]

In *Chrysler*, the debtors sought court approval of a section 363 sale of substantially all of their assets, free and clear of all liens and other interests, to a newly created entity that would be owned by Fiat and an employee benefits association.[11] The proposed consideration for the sale was, among other things, $2 billion in cash to be applied to the loans under the debtors' pre-petition first lien credit facility.[12] The lenders under the first lien credit agreement were owed approximately $6.9 billion.[13] Pursuant to the applicable provisions of the pre-petition loan documents, the first lien administrative agent, as well as holders of approximately 92.5% of the first lien debt, consented to the debtors' proposed sale.[14]

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[7] 11 U.S.C. § 363(f) (2006).

[8] *See In re* Terrace Gardens Park P'ship, 96 B.R. 707, 715 (Bankr. W.D. Tex. 1989) (noting court should balance debtor's need for flexibility in order to reorganize with creditors' rights to adequate protection when evaluating proposed sale free and clear of liens).

[9] 405 B.R. 84 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot*, 130 S. Ct. 1015 (2009).

[10] *See id.* at 113 (deciding whether there was consent to 363(f) sale of assets where Collateral Trustee, who held liens, consented, but Indiana Funds, party in interest to portion of debt as assignees, did not).

[11] *Id.* at 93.

[12] *Id.* at 92.

[13] *Id.* at 93.

[14] *Id.* at 102.

The remaining lenders objected to the sale, arguing, among other things, that the administrative agent did not have the authority under the credit documents to consent to the sale on the objecting lenders' behalf, but that unanimous consent from all first lien lenders was necessary instead.[15] In particular, the objecting lenders argued that the first lien credit agreement required unanimous consent before any of the first lien loan documents could be amended, waived, supplemented or modified, and that consenting to the sale, which resulted in a release of the first lien collateral for far less than the outstanding amounts owing under the first lien credit agreement, was an amendment of the credit agreement.[16]

The debtors, in turn, argued that the objecting lenders lacked standing to object to the proposed sale because, in essence, they agreed under the pre-petition loan documents to appoint the administrative agent to act on their behalf—at the direction of the "required lenders"—to exercise remedies under the first lien credit agreement, and to dispose of the first lien collateral in that regard.[17] The bankruptcy court sided with the debtors, finding, after a lengthy recitation of the relevant provisions of the first lien credit documents, that the loan documents vested in the administrative agent the exclusive authority, at the direction of the "required lenders," to direct the collateral trustee's exercise of the first lien lenders' remedies with respect to the first lien collateral.[18] The court further found that the sale was not an amendment or waiver of any kind, but was instead a simple exercise of the provisions of the first lien loan documents.[19] The court found that "[r]estricting enforcement to a single agent to engage in unified action for the interests of a group of lenders, based upon a majority vote, avoids chaos and prevents a single lender from being preferred over others."[20]

The decision in *Chrysler* is consistent with existing, but limited, precedent regarding an agent's ability under loan documents to bind a syndicate of lenders based on the direction of the majority, albeit, outside of the sale context. In *Beal Savings Bank v. Sommer*,[21] for example, the borrower's credit facility was guaranteed by its parent corporation pursuant to a "keep-well agreement," which required the parent to make an equity contribution in the borrower if certain financial ratios fell below certain proscribed minimums.[22] After the borrower filed for bankruptcy protection, the agent under the credit agreement and the lenders holding approximately 95.5% of the loan entered into a settlement agreement, whereby the signatory lenders directed the administrative agent to forbear from

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[15] *Id.*
[16] *Id.*
[17] *Id.* at 103.
[18] *Id.* at 102–03 (noting section 2.5 of Collateral Trust Agreement gave Administrative Agent exclusive authority to direct Collateral Trustee's action for purposes of having Administrative Agent and Collateral Trustee act for collective interest of lenders).
[19] *Id.* at 103 (holding loan documents authorized sale and thus did not act as "release" of collateral).
[20] *Id.*
[21] 8 N.Y.3d 318 (2007).
[22] *Id.* at 322.

exercising remedies under the keep-well agreement.[23] The single hold-out bank—Beal Bank—then sued the parent corporation to enforce the keep-well agreement.[24]

The Court of Appeals upheld the lower court's dismissal of Beal Bank's complaint against the parent, holding that the enforcement provisions of the credit agreement, which authorized the administrative agent to exercise remedies in connection with the loan documents and the keep-well agreement (at the direction of the "requisite lenders"), included the power to refrain from taking enforcement actions.[25] Like the *Chrysler* court, the court found that the settlement agreement was not an amendment or modification of the loan agreement requiring unanimous lender consent, but, instead, was simply an exercise of the loan agreement provisions.[26]

Similarly, in *In re Delphi Corp.*,[27] the bankruptcy court held in an unpublished order that the administrative agent under the debtors' post-petition DIP facility had the power, at the direction of the requisite lenders, to enter into a forbearance agreement with the debtors to forbear from exercising remedies upon the debtors' failure to repay the DIP agreement upon its maturity.[28] In overruling the objections of certain DIP lenders who argued that the forbearance was nothing less than an extension of the DIP facility—which required unanimous lender approval—the court held that, "having been accorded the right to exercise remedies . . . , the agent, at the direction of the required lenders, also has the authority either to compromise or forbear in respect of those remedies . . . ."[29]

Similar issues have arisen regarding the use of cash collateral in bankruptcy. In *In re Premier International Holdings*,[30] the bankruptcy court faced the question of who qualifies as an "entity that has an interest" in cash collateral within the meaning of section 363(c)(2)(A) of the Bankruptcy Code, and, more specifically, whether each lender in a loan syndicate must individually consent to the debtors' use of cash collateral.[31] In that case, the administrative agent, at the direction of the "required

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[23] *Id.* at 323.

[24] *Id.* at 324 ("Beal filed a claim under section 4 of the Keep-Well and sought 90 million dollars to share with the other lenders or, in the alternative, Beal's pro rata share.").

[25] *See id.* at 328 (noting administrative agent, at direction of required lenders, may or may not pursue legal action according to agreement).

[26] *See id.* at 328 (regarding Keep-Well provision under which Beal is bringing suit, which gives "Administrative Agent" sole authority to pursue default remedies, as underscoring credit agreement and loan documents collectively).

[27] No. 05-44481 (Bankr. S.D.N.Y.).

[28] *See* Transcript of Hearing at 148, *In re* Delphi Corp., No. 05-44481 (Bankr. S.D.N.Y. Dec. 1, 2008) (on file with authors).

[29] Transcript of Hearing at 156, *In re* Delphi Corp., No. 05-44481 (Bankr. S.D.N.Y. Dec. 1, 2008).

[30] No. 09-12019 (CSS) (Bankr. D. Del.).

[31] *See* Motion of the Debtors and Debtors in Possession for Entry of Orders (I) Authorizing the Use of Lenders' Cash Collateral, (II) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 361 and 363, and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) at 2, 10, *In re* Premier Int'l Holdings, Inc., No. 09-12019 (CSS), 2010 WL 2745964 (Bankr. D. Del. Apr. 29, 2010) (describing parties with interest in cash collateral as borrowers, administrative agent, and "Lenders" collectively, and alleging, because Lenders have consented to use of cash collateral, section 362(c)(2) has been satisfied and use of cash collateral should be authorized); *see also* Objection of Avenue Capital Mgmt. II L.P. to Motion of the Debtors and

lenders" under the credit facility, consented to the debtors' use of cash collateral on behalf of the lender syndicate pursuant to provisions in the credit agreement, which provided the agent with "[t]he power and right . . . to . . . generally sell, transfer, pledge, and make any agreement with respect to . . . the Collateral as [if it were] the absolute owner thereof for all purposes" and to take any action to "protect, preserve or realize upon the Collateral and the . . . security interests therein . . . ."[32] A single first lien lender holding a 9% interest in the facility objected to cash collateral use, arguing that the plain language of section 363(c)(2) provides that, as a lender under the credit agreement, it has an individual interest in the cash collateral for purposes of section 363(c)(2)(A) and, therefore, must consent to its use.[33] It further argued that the credit agreement did not grant the administrative agent or collateral agent the right to consent on its behalf for purposes of section 363(c)(2) of the Bankruptcy Code.[34]

Citing the immediate and irreparable harm that the debtors would suffer without the interim use of cash, the court issued a bridge order allowing a limited use of cash collateral and granting adequate protection pending a final hearing.[35] At the interim hearing, the court did find, however, that each lender maintained an interest in the cash collateral, citing the broad interpretation of "interest" under section 541 of the Bankruptcy Code.[36] Therefore, presumably each lender's consent to use of cash collateral was required for the debtor to be able to use cash collateral on a

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Debtors for Entry of Orders (I) Authorizing the Use of Lenders' Cash Collateral, (II) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 361 and 363, and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) at 2, *In re Premier Int'l Holdings*, No. 09-12019 (CSS), 2010 WL 2745964 (Bankr. D. Del. Apr. 29, 2010) [hereinafter Objection to Debtors' Motion in Premier Int'l Holdings] (arguing section 362(c) means every entity that has interest in collateral must consent, unless court determines non-consenting lender is adequately protected, and it is not enough that administrative agent and *some* lenders consented).

[32] Response of Debtors and Debtors in Possession to Objection of Avenue Capital Management II L.P. to Motion for Entry of Orders (I) Authorizing the Use of Lenders' Cash Collateral, (II) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 361 and 363, and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) at 10, *In re Premier Int'l Holdings*, No. 09-12019 (CSS), 2010 WL 2745964 (quoting Amended and Restated Guarantee and Collateral Agreement dated May 25, 2007, attached as Exhibit H to the Response at § 7.1(v)(8)).

[33] *See id.* at 2 (noting Avenue is 9% lienholder objecting to cash collateral use); *see also* Objection to Debtors' Motion in Premier Int'l Holdings, *supra* note 31, at 5–6 (arguing section 362(c) explicitly states "each entity" with interest in cash collateral must consent, and section 362(c) cannot be satisfied because Avenue has interest and has not consented).

[34] *See* Objection to Debtors' Motion in Premier Int'l Holdings, *supra* note 31, at 5–6 (arguing credit agreement doesn't "expressly delegate" lender's rights regarding cash collateral to administrative agent).

[35] *See* Stipulation and Interim Order (I) Authorizing the Use of Lenders' Cash Collateral, (II) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 361 and 363 and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) at 7–8, *In re Premier Int'l Holdings, Inc.*, No. 09-12019 (CSS), 2010 WL 2745964.

[36] *See* Transcript of June 23, 2009 Hearing Before the Honorable Christopher S. Sontchi United States Bankruptcy Judge at 58–59, *In re* Premier Int'l Holdings, Inc., No. 09-12019 (CSS), 2010 WL 2745964 (Bankr. D. Del. Apr. 29, 2010) [hereinafter Premier June 23, 2009 Transcript] ("[I]nterest is broadly defined under the Bankruptcy Code and broadly used under the Bankruptcy Code.").

consensual basis.[37] At the same time, however, the court also concluded that, under the credit agreement, the objecting lender gave the administrative agent the authority to consent to use of cash collateral on its behalf.[38] The court ultimately entered a second interim order and a final order approving the use of cash collateral.[39]

Thus, while a sale by consent may be the method most conducive to effecting a sale of a debtor's assets, what constitutes "consent" in the context of a syndicate of lenders typically will mean consent from some majority of lenders, but not necessarily unanimous consent.[40] In that regard, even a "consensual" sale may prove to be litigious. Additionally, a secured lender who is part of a lending syndicate should be aware that, in the instance where the requisite majority of the lending syndicate has given its consent to a proposed sale, any dissenting lenders may be dragged along in the process. Moreover, as discussed in greater detail below, a dissenting lender also could be forced to credit bid its debt if the requisite majority of syndicate lenders direct the administrative agent to submit a credit bid as part of a sale auction process.

It should be noted, however, that the decisions discussed above are ultimately based upon the rights that individual lenders have delegated to an administrative or collateral agent, acting on behalf of some majority of the lenders in the group, under a credit agreement. While the language of the relevant agreements may not always be precise as to whether an individual lender has granted the majority the right to consent to a sale of collateral or some other right (such as the right to consent to use cash collateral as in *Premier*), courts tend to find that each individual lender has delegated its consent rights to the majority where that result appears to be a reasonable inference from the language, structure, and spirit of the agreements.[41] Credit agreements typically have provisions that specify that certain actions cannot be taken, or amendments made, by the lender group without the consent of each individual lender.[42] As such, if a credit agreement is drafted such that it is clear that

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[37] *See id.* at 59 (finding section 363(c)(2)(a) requires lenders with "beneficial security interest in the [cash] collateral" to consent to its use).

[38] *See id.* at 63–64 (holding language in agreement permitting administrative agent to deal with collateral "fully and completely" and "for all purposes" is broad enough to permit administrative agent to agree or not agree to use of cash collateral).

[39] *See* Final Order (I) Authorizing the Use of Lenders' Cash Collateral, (II) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 361 and 363 and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) at 8, *In re Premier Int'l Holdings, Inc.*, No. 09-12019 (CSS), 2010 WL 2745964.

[40] *See* Premier June 23, 2009 Transcript, *supra* note 36, at 59, 64 (concluding consent to use cash collateral could be given by administrative agent even without consent of one of the lenders).

[41] *See e.g., id.* at 63–64 (holding language of agreement is sufficiently broad to find delegation of consent rights).

[42] *See, e.g., In re* GWLS Holdings, Inc., No. 08-12430 (PJW), 2009 WL 453110, at *2 (Bankr. D. Del. Feb. 23, 2009) (citing credit agreement requiring unanimous consent of all lenders for certain actions). In fact, that would seem to be the default rule, since each lender is party to the agreement, although often credit agreements change the default rule by allowing the majority lenders to take all actions and modify the contract except in specific instances where unanimous lender consent is required. *See In re* Chrysler LLC, 405 B.R. 84, 102–03 (Bankr. S.D.N.Y. 2009) (stating unanimous consent requirement applies to contract modifications, but administrative agent and collateral trustee have authority to act in collective interest of

a sale of substantially all of a debtor's assets cannot be approved without unanimous lender consent, then the basis of the decisions described above — the delegation of consent rights by individual lenders to the majority of the lender group — will not apply. Only time will determine whether lenders will insist on the individual right to consent to full company asset sales as part of the negotiation over the terms of credit agreements.

Time may also determine whether a body of law develops over the voting rights of syndicate members to approve or reject a proposed sale of substantially all of a debtor's assets similar to the law that has developed in the chapter 11 plan context. In the plan context, individual lenders sometimes purchase claims against a debtor in order to either block or assure acceptance of a debtor's proposed chapter 11 plan. A chapter 11 plan must be accepted by at least two-thirds in dollar amount and more than one-half in number of creditors voting in each voting class to be confirmed consensually under the Bankruptcy Code.[43] Thus, for instance, if a lender wants to block a debtor's plan, it may attempt to acquire at least one-third of the claims in a plan class and vote those claims against the plan.

The bankruptcy courts, however, have sometimes disallowed the votes of creditors who purchase claims in order to affect plan voting, especially where the courts view the actions of the claim buyer as being for some particular ulterior or improper purpose, or where the claim buyer may have misused confidential, inside information concerning the debtor.[44] In most of the cases noted above, and, in fact, in most of the cases discussed throughout this article, that involve an objection to actions taken by an administrative agent at the direction of a "required lender" group, the objecting party held a small percentage of the debt under the relevant credit facility. Other situations may, however, involve a real dispute within a lender group as to whether to approve or reject a proposed section 363 sale of a debtor, where a significant amount of debt is both in favor of, and against, the proposal.[45]

In those circumstances, lenders who either want the transaction halted or approved by the lender group may determine it to be beneficial to buy additional debt under the facility to attempt to ensure the result they support. As such, these

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lenders regarding enforcement provisions), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot*, 130 S. Ct. 1015 (2009).

[43] 11 U.S.C. § 1126(c) (2006) ("A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . that have accepted or rejected such plan.").

[44] *See, e.g., In re* P-R Holding Corp., 147 F.2d 895, 897–98 (2d Cir. 1945) (disqualifying votes on claims purchased and voted in bad faith); *In re* Holly Knoll P'Ship, 167 B.R. 381, 385 (Bankr. E.D. Pa. 1994) (holding votes may be designated if acquired or voted in bad faith); *In re* Allegheny Int'l, Inc., 118 B.R. 282, 303–04 (Bankr. W.D. Penn. 1990) (designating votes on plan after finding votes not in good faith and where purchaser misused confidential information of issuer).

[45] *See, e.g.*, Supplemental Objection of the Term Lenders to Debtors' Motion for Order Approving the Sale of Substantially All their Assets Free and Clear of Liens, Claims, Encumbrances and Interests at 8 n.7, *In re* Foamex Int'l, No. 109-10560 (KJC) (Bankr. D. Del. Feb. 19, 2009) (on file with authors) (noting objecting lenders to sale hold over $100 million of the $324.8 million of pre-petition first lien term loan obligations).

situations may start to look very much like those where lenders have purchased claims in order to block or push through a chapter 11 plan for the debtor.

Again, only time may determine whether bankruptcy courts will be called upon to determine whether the votes of lenders who have purchased claims in the syndicate in order to affect a section 363 sale should be allowed. Since those votes are not votes on a debtor's chapter 11 plan, but instead votes within a syndicate group not directly involving the debtor, courts may be reluctant to intervene in such matters and may, in fact, not believe they even have jurisdiction to do so. In addition, the Bankruptcy Code has a specific provision — section 1126(e) — which expressly authorizes a bankruptcy court to disallow a vote on a plan where, among other things, the vote was not made in "good faith."[46] No such provision authorizes a bankruptcy court to find that a lender's vote under a credit agreement should not be counted.[47] As such, the court presumably would be relying on its general equitable powers under section 105(a) of the Bankruptcy Code,[48] as well as its right to adjudicate under its "related to" jurisdictional powers disputes that have some bearing on a debtor's bankruptcy case, even if the dispute may not directly involve the debtor.[49] Given the more limited basis on which the bankruptcy court would be exercising its power, it seems likely that there would be significant disputes as to whether the court truly had the power to disallow votes in a lender syndicate on whether to approve a sale of a debtor's assets free and clear of liens.

B. Sales Free and Clear Absent Consent of the Secured Lender under Section 363(f)(3)

Absent consent, a sale free and clear under 363(f) becomes more complex, and difficult issues concerning the sale collateral begin to take shape.[50] Take, for example, a common situation where (1) a company's assets are encumbered by properly perfected floating liens of pre-petition first and second lien lenders, (2) certain assets are encumbered by purchase money security interests arising under applicable state law, and (3) the proposed purchase price is insufficient to satisfy each of these interest holders in full.

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[46] *See* 11 U.S.C. § 1126(e) ("[T]he court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith . . . .").

[47] *See* Randall Klein & Danielle Juhle, *Majority Rules: Non-Cash Bids and the Reorganization Sale*, 84 AM. BANKR. L.J. 297, 321–326 (2010) (recognizing lack of mandatory good faith on part of administrative agents and majority lenders consenting to section 363 sales, but calling for use of good faith as solution to conflicts between dissenting lenders).

[48] *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

[49] *See* 28 U.S.C. § 157(a) (2006) (granting bankruptcy courts power to determine proceedings "related to a case under title 11"); Pacor, Inc. v. Higgins, 743 F.2d 984, 991–92 (3d Cir. 1984) ("[T]he usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.").

[50] *See, e.g., In re* Terrace Chalet Apartments, Ltd., 159 B.R. 821, 825–29 (N.D. Ill. 1993) (analyzing section 363(f) sales where consent lacking and finding extensive debate between courts over definition of "value" in 363(f)(3), "bona fide dispute" in 363(f)(4), and two competing interpretations of 363(f)(5)).

If the debtor is unable to obtain the required consents under section 363(f)(2) of the Bankruptcy Code, the next issue would be whether section 363(f)(3) provides a basis for the sale free and clear of liens. Again, section 363(f)(3) provides that property can be sold free and clear of an interest in such property if "such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property . . . ."[51] A minority of jurisdictions interpret section 363(f)(3)'s mandate that the purchase price exceed the "aggregate value of all liens on such property" as meaning that the purchase price must exceed the "economic value" of the liens encumbering the sale property, rather than the face amount of the secured claims against such property.[52] In these jurisdictions, courts may be willing to approve a sale even where the secured lenders are undersecured, since the "value" of their liens is simply the value of the property, thereby no longer making the lenders undersecured for purposes of a section 363 sale free and clear of liens.

However, under this interpretation, it would seem that a sale arguably could be approved under section 363(f)(3) under almost any circumstance, because the purchase price for an asset will always dictate the "economic value" of the liens on the property. Moreover, even accepting these courts' interpretation of the "value" of liens under section 363(f)(3), that section requires that the purchase price for an asset be "**greater than**" the aggregate value of all liens on the subject property. To the extent that the purchase price dictates the value of the liens, then arguably the purchase price will never be "greater" than the value of the liens unless the purchase price actually exceeds the face amount of the claims against the property. Thus, even these courts presumably should not be approving sales under section 363(f)(3) of collateral held by undersecured lenders.

The majority of cases, by contrast, have held that section 363(f)(3) requires the purchase price to exceed the face amount of all secured claims against the subject property.[53] Under the presupposed facts set forth above, in a jurisdiction following

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[51] 11 U.S.C. § 363(f)(3).

[52] *See, e.g., In re* Beker Indus. Corp., 63 B.R. 474, 476–77 (Bankr. S.D.N.Y. 1986) (reading section 363(f)(3) in conjunction with section 506(a) and concluding "value" in section 363(f)(3) means actual economic value of liens, not face amount of liens); *see also In re* WPRV-TV, Inc., 143 B.R. 315, 320 (D.P.R. 1991) (adopting view that "value" under 363(f)(3) should be interpreted as actual value, rather than amount of lien); *In re* Oneida Lake Dev., Inc., 114 B.R. 352, 356–357 (Bankr. N.D.N.Y. 1990) (adopting *Beker* court's view of term "value" under 363(f)(3) meaning value of secured claims in debtor's property); *In re* Terrace Gardens Park P'ship, 96 B.R. 707, 712–13 (Bankr. W.D. Tex. 1989) (noting split of authority as to interpretation of "value," but ultimately agreeing with *Beker* court's view).

[53] *See, e.g.*, Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), 391 B.R. 25, 39 (B.A.P. 9th Cir. 2008) (rejecting trustee's argument that section 363(f)(3) defines aggregate value as economic value); *In re* WDH Howell, LLC, 298 B.R. 527, 534 (D.N.J. 2003) (holding section 363(f)(3) sale price must be greater than face value of all liens); *In re* Terrace Chalet Apartments, Ltd., 159 B.R. 821, 826 (N.D. Ill. 1993) (explaining Seventh Circuit's view that section 363(f)(3) sale must exceed amount in claims); *In re* Canonigo, 276 B.R. 257, 266 (Bankr. N.D. Cal. 2002) (holding section 363(f)(3) requires sale price to be greater than total amount of liens).

the majority rule, a sale could not be approved pursuant to section 363(f)(3).[54] This result is more in line with pre-Code practice, which, as set forth at the outset of this article, apparently provided that a sale of a debtor's assets could not be approved if there was no equity in the property.[55]

Where the value of the collateral is in excess of the first lien debt on the property, but less than the amount of the first and second lien debt together, a sale may potentially proceed over at least the objection of the second lien lender because its interest could be extinguished in a nonbankruptcy foreclosure proceeding or UCC sale, thus arguably satisfying section 363(f)(1) of the Bankruptcy Code.[56] That section allows sales free and clear of liens where applicable nonbankruptcy law permits such result.[57] Section 363(f)(1) would be available, however, only if one interprets section 363(f)(1) as allowing sales free and clear where that result could be effectuated under nonbankruptcy law in a transaction implemented by a party other than the debtor (such as a foreclosure sale). There exists a question as to whether that is a proper interpretation of section 363(f)(1), since, as described below, most courts interpret section 363(f)(5) as already providing that liens can be extinguished in a section 363 sale where that result is possible in a nonbankruptcy foreclosure or similar proceeding.[58] Therefore, section 363(f)(1) would not be necessary to authorize that result. Instead, that section might be interpreted as addressing only those situations where the owner of the asset (i.e. the debtor) is authorized under nonbankruptcy law to sell an asset free and clear of an interest in such asset.

The ability of a debtor to sell assets free and clear in the presupposed facts becomes more difficult where there are objections from the first lien or purchase money security interest ("PMSI") lender. In these circumstances, section 363(f)(1) clearly would not be available, since these parties hold first priority liens on their respective assets, nor would section 363(f)(3) in a jurisdiction following the majority interpretation of that section. Consequently, it appears that only section 363(f)(5) of the Bankruptcy Code could potentially justify a sale over such objections.

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[54] *See In re* Prime Props. of N.Y., Inc., No. 1-09-46912-JBR, 2010 WL 4026380, at *2–3 (Bankr. E.D.N.Y. Oct. 13, 2010) (holding section 363(f)(3) requires that the actual sale price is greater than the face value of the lien); *In re* WDH Howell, LLC, 298 B.R. at 534 (reversing court's approval of section 363(f)(3) sale because sale price was less than face amount of secured claim).

[55] *See supra* Part I (explaining pre-Code policy against asset sales without surplus for unsecured creditors).

[56] *See* WC Homes, LLC v. United States, No. DKC 2009-1239, 2010 WL 3221845, at *5 (D. Md. Aug. 13, 2010) (explaining junior liens extinguished upon foreclosure of more senior lien, allowing title to pass free and clear of junior liens).

[57] 11 U.S.C. § 363(f)(1) (2006) ("The trustee may sell property . . . free and clear of any interest in such property of an entity other than the estate . . . if applicable nonbankruptcy law permits sale of such property free and clear of such interest. . . .").

[58] *See, e.g., In re* Gulf States Steel, Inc. of Ala., 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002) (interpreting section 363(f)(5) to authorize sales of property free and clear of liens if trustee can point to other legal mechanisms that would extinguish liens).

C. Sales Free and Clear Absent Consent of the Secured Lender under Section 363(f)(5)

Section 363(f)(5) provides that property of a debtor may be sold free and clear of a lien or other interest in such property held by an entity if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."[59] Given the importance of section 363 sales in bankruptcy proceedings, there has been a great deal of debate as to the meaning of section 363(f)(5).[60] What does it mean that an entity "can be compelled" to accept a money satisfaction? What constitutes a "legal or equitable proceeding" for purposes of this section? Does the phrase "money satisfaction" require payment in full or simply payment in cash of the economic value of a lien? Surprisingly, there appears to be a lack of cohesive guidance in the case law, and little guidance at the circuit level, on these important questions.

1. Could be Compelled in a "Legal or Equitable" Proceeding

It is settled law that the phrase "could be compelled" within the context of section 363(f)(5) contemplates a "hypothetical" proceeding in which a secured creditor could be compelled to accept a monetary satisfaction of its interest, and does not require the sale proceeding itself to provide for actual satisfaction of the interest(s) in question out of the proceeds.[61] Consequently, actual payment to such creditors is not necessary under section 363(f)(5).[62]

A key question regarding this "hypothetical proceeding," however, remains unsettled — that is, must a party seeking to sell assets pursuant to section 363(f)(5) simply show the existence of some mechanism by which, under any set of facts, the creditor may be compelled to accept money satisfaction in return for its interest in property; or is it the moving party's burden to present evidence that, under the present facts, there exists a mechanism that could be used to extinguish the lienholder's interest in the subject property?

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[59] 11 U.S.C. § 363(f)(5).

[60] *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(F) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 251–57 (2002) (discussing several interpretations of section 363(f)(5), noting ambiguously broad language of section 363(f)(5) has led courts to interpret statue differently on case-by-case basis).

[61] *See, e.g., In re* Terrace Chalet Apartments, Ltd., 159 B.R. 821, 829 (N.D. Ill. 1993) ("Section 363(f)(5) would repeat Section 363(f)(3) if it were interpreted merely to require a specific amount of money that the trustee could pay in order to sell the property free and clear of a lien."); *In re* Healthco Int'l., Inc., 174 B.R. 174, 176 (Bankr. D. Mass. 1994) (holding section 363(f)(5) "requires only that the interest in question be subject to final satisfaction on a hypothetical basis, not that there be an actual payment in satisfaction of the interest from the proceeds of the sale . . ."); *In re* Gulf States Steel, Inc. of Ala., 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002) (holding phrase "could be compelled" only requires showing that mechanism exists whereby lien or interest could be extinguished; it does not require actual payment to creditor).

[62] *See In re Healthco Int'l, Inc.*, 174 B.R. at 176.

Clearly a foreclosure sale, UCC sale, or other nonbankruptcy remedy would constitute a "legal or equitable proceeding" within the meaning of section 363(f)(5).[63] As noted previously, however, section 363(f)(1) may already permit sales of assets free and clear of a lien or interest if such sale would be permitted under applicable nonbankruptcy law, assuming that section 363(f)(1) applies to actions taken by parties other than the debtor.[64] Thus, some courts have stated that section 363(f)(5) appears to contemplate that "legal or equitable proceeding[s]" would include proceedings under the Bankruptcy Code.[65]

Courts adopting this more liberal interpretation of the "hypothetical proceeding" have held that section 363(f)(5) is satisfied when the moving party establishes the existence of any bankruptcy mechanism that could be used to extinguish the creditor's lien or interest under any facts, even absent a showing that such a mechanism is applicable under the present facts.[66] The most common bankruptcy proceeding cited in the context of (f)(5) is a cramdown proceeding under section 1129(b)(2)(A).[67] "Under Section 1129(b)(2)(A) of the Bankruptcy Code, a '[C]hapter 11 plan proponent can satisfy a secured claim, over the objection of a claimant, by cash payments having a present value equal to the value of the security interest.'"[68]

Consequently, some courts hold that a cramdown proceeding is a "legal or equitable" proceeding for purposes of section 363(f)(5) because a "trustee may sell the assets of an estate free and clear, without the consent of a secured creditor, if present or future payments are made to the secured creditor in an amount equal to the present value of the collateral, even if such value is less than the debt."[69] In the

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[63] *See In re Gulf States Steel*, 285 B.R. at 502, 508, 518 (referring to section 363(f)(5) sale providing adequate protection and substantive and procedural due process rights of creditors in that it would be equivalent to nonbankruptcy foreclosure by secured creditor); *see also In re* Kellstrom Indus., Inc., 282 B.R. 787, 794 (Bankr. D. Del. 2002) (authorizing sale of parts free and clear of creditor AVA's right to withhold delivery because, under U.C.C. § 2-702(1), "[i]f the Debtors tendered full payment in cash to AVA and it refused, the Debtors could compel AVA to accept that payment in satisfaction of its right to withhold and stop delivery of the [p]arts").

[64] *See supra* notes 56–58 and accompanying text.

[65] *See In re Healthco Int'l*, 174 B.R. at 176–77 (noting Congress would have made explicit reference to applicable nonbankruptcy law had it meant to exclude proceedings under Bankruptcy Code from section 363(f)(5)).

[66] *See In re Terrace Chalet Apartments*, 159 B.R. at 829 (stating 363(f)(5) can be satisfied through use of section 1129(b)(2) cramdown provision of Bankruptcy Code to extinguish liens).

[67] *See In re* Grand Slam U.S.A., Inc., 178 B.R. 460, 462 (E.D. Mich. 1995) ("A typical legal proceeding which compels a creditor to receive less than full money satisfaction is a procedure, commonly known as 'cramdown,' that is applicable to Chapter 11 cases."); *see also In re Healthco Int'l*, 174 B.R. at 176 (indicating "cramdown" proceedings comply with section 363(f)(5)); *In re Terrace Chalet Apartments*, 159 B.R. at 829 (emphasizing in cramdown proceedings, creditor must accept monetary satisfaction of claim and resulting extinguishment of lien); *In re* WPRV-TV, Inc., 143 B.R. 315, 321 (D.P.R. 1991) (comparing sections 1129 and 363(f)(5) for proposition that sales can be upheld in bankruptcy without full satisfaction of claim).

[68] *In re Grand Slam U.S.A.*, 178 B.R. at 462 (quoting *In re Healthco Int'l, Inc.*, 174 B.R. at 176); *see also* 11 U.S.C. § 1129(b)(2)(A) (2006) (providing secured lender can be crammed down if, among other things, plan provides for payments to it over time that have present value of secured lender's interest in collateral).

[69] *In re Grand Slam U.S.A.*, 178 B.R. at 462.

most extreme cases, courts using the "hypothetical cramdown" approach have approved sales under section 363(f)(5) absent a plan, or any showing that such a cramdown could actually be effected under the facts of the case, and in some cases, have even used a chapter 11 cramdown to justify a sale free and clear in a case filed under chapter 7 of the Bankruptcy Code.[70]

Courts have also approved asset sales under section 363(f)(5) citing section 724(b) of the Bankruptcy Code as a proceeding where the secured lender could be compelled to accept a money satisfaction for less than its claim.[71] These courts have used the section 724(b) justification because, in the "appropriate cases," this section could be used to compel secured creditors to accept payment in satisfaction of their liens.[72] This interpretation of "could be compelled" is incredibly broad, setting forth a rule under which it is difficult to articulate a set of facts under which a sale of assets free and clear would not be permitted under section 363(f)(5).

The other, more restrictive approach adopted by courts, as best illustrated in the recent decision in *Clear Channel*, holds that the mere existence of any mechanism is insufficient to satisfy section 363(f)(5) absent a showing that, under the facts of

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[70] *See In re* Gulf States Steel, Inc. of Ala., 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002) (holding sale appropriate under section 363(f)(5) in chapter 7 case because creditors could be subject to cramdown in chapter 11 case); *In re Healthco Int'l*, 174 B.R. at 176 (holding hypothetical nature of payment in 363(f)(5) means chapter 11 cramdown can apply to 363(f)(5) even in chapter 7 case).

[71] *See In re Grand Slam U.S.A.*, 178 B.R. at 464 (noting section 724(b)(2), just like section 1129(b)(2)(A), is legal proceeding forcing lienholder to accept money satisfaction for less than value of its claim). Section 724(b) of the Bankruptcy Code provides:

> Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title . . . and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed –
>
> (1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;
> (2) second, to any holder of a claim of a kind specified in section 507(a)(1) . . ., 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;
> (3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;
> (4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;
> (5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim secured by such tax lien is not paid under paragraph (3) of this subsection; and
> (6) sixth, to the estate.

11 U.S.C. § 724(b).

[72] *See In re Grand Slam U.S.A.*, 178 B.R. at 463 (holding section 724(b) of Bankruptcy Code justifies sale free and clear of tax lien because the mechanism, "in appropriate cases," can be used to compel holders of such liens to accept payment of money in satisfaction of liens).

the case, such mechanism could actually be used to extinguish the lienholder's interest.[73] In *Clear Channel*, the court reversed a bankruptcy court order that approved a sale of the debtor's assets free and clear pursuant to section 363(f)(5), finding that the mere hypothetical existence of a mechanism by which an entity could be compelled to accept a money satisfaction of its claim was not sufficient, from an evidentiary standpoint, to justify a sale under section 363(f)(5).[74] Instead, the court found that, in order to approve a sale under section 363(f)(5), "the bankruptcy court must make a finding of the existence of such a mechanism and the trustee must demonstrate how satisfaction of the lien 'could be compelled.'"[75] In this instance, the court found that no evidentiary showing had been made, and, in fact, the bankruptcy court had expressly ruled that no such evidentiary showing was necessary.[76] Moreover, the court rejected the "hypothetical cramdown" approach, used by several other courts to justify a sale of assets under section (f)(5), holding that the "use of the cramdown mechanism to allow a sale free and clear under § 363(f)(5) uses circular reasoning—it sanctions the effect of cramdown without requiring any of § 1129(b)'s substantive and procedural protections."[77] The court further suggested that no section of the Bankruptcy Code would be appropriate in the section 363(f)(5) context because "[i]f the proceeding authorizing the satisfaction was found elsewhere in the Bankruptcy Code, then an estate would not need § 363(f)(5) at all; it could simply use the other Code provision."[78]

The *Clear Channel* court relied on the holding in *Terrace Chalet*, in which the court noted that the mere existence of the chapter 11 cramdown provision was not sufficient to mandate a sale pursuant to section 363(f)(5) absent a showing that it could be used under the facts of the case.[79] In that case, however, the court seemed to suggest, unlike in *Clear Channel*, that a cramdown could be used to approve a sale under section 363(f)(5), provided the necessary evidentiary showing had been made.[80] However, because there were doubts as to the good faith of the debtor, the court declined to permit a sale free and clear pursuant to section 363(f)(5) until it was shown that the debtor could, if necessary, actually effectuate a cramdown of the

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[73] *See also In re* Haskell, L.P., 321 B.R. 1, 9 (Bankr. D. Mass 2005) (holding mere existence of eminent domain powers insufficient to satisfy section 363(f)(5) absent showing that such mechanism could be exercised by trustee under facts of case); *In re* Terrace Chalet Apartments, Ltd., 159 B.R. 821, 829–30 (N.D. Ill. 1993) (requiring debtor demonstrate it can actually cramdown creditor's lien under section 1129(b)(2) before allowing sale under section 363(f)(5)).

[74] Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), 391 B.R. 25, 45 (B.A.P. 9th Cir. 2008).

[75] *Id.* (quoting *In re Terrace Chalet Apartments*, 159 B.R. at 829–30).

[76] *Id.*

[77] *Id.* at 46.

[78] *Id.*

[79] *See id.* at 45 (citing *In re Terrace Chalet Apartments*, 159 B.R. at 829) (permitting lien extinguishment if trustee could demonstrate existence of cramdown or other legal mechanism were available in that case).

[80] *See In re Terrace Chalet Apartments*, 159 B.R. at 829 (stating section 1129(b)(2) cramdown is legal mechanism that could extinguish lien without full satisfaction of secured debt, and, if it exists given the facts, it could be used to approve sale under section 363(f)(5)).

secured lender under section 1129(b)(2) of the Bankruptcy Code.[81] Accordingly, the court remanded to the bankruptcy court for a determination as to whether the debtor was acting in good faith.[82]

From a lender's perspective, clearly the opinions following the full "hypothetical" approach are problematic in the sale context, because it is unclear that a sale would ever not be approved under 363(f)(5). In these jurisdictions, a lender may have very little protection from a sale of its collateral. Somewhat more settling to a lender are those jurisdictions following the *Clear Channel* and *Terrance Chalet* approach, placing a heavier evidentiary burden on the debtor to establish the availability of a sale under section 363(f)(5). In fact, under the *Clear Channel* holding, a debtor may have a very significant evidentiary burden if it is unable to rely on any section of the Bankruptcy Code to satisfy section 363(f)(5).

A related question that might be posed to determine how section 363(f)(5) should be interpreted is whether the legal or equitable proceeding referenced in that section must involve an actual transfer of the relevant property by the debtor. While the statute does not make that statement, one interpretation of section 363(f)(5) is that Congress permitted debtors to sell assets free and clear of liens for less than the face amount of the debt against such property where they could effect such a sale outside of bankruptcy. Otherwise, consistent with pre-Code practice, such a sale would not be approved. But there was no reason to prevent a bankruptcy court from approving a sale that actually could be effectuated outside of bankruptcy. What Congress may not have contemplated was that the legal or equitable proceeding that debtors would use to justify a section 363(f)(5) sale was the Bankruptcy Code itself, and a debtor's cramdown power, where the debtor was not actually selling the property, but rather retaining it and discharging debt, a result that is unique to bankruptcy and similar insolvency law. A gloss on section 363(f)(5) would, thus, provide that only proceedings where a debtor could sell the property free and clear of liens without paying the secured debt in full could be used to justify a free and clear sale under section 363(f)(5).

2. Money Satisfaction of the Interest of the Secured Lender

The other issue that arises in the context of interpreting and applying section 363(f)(5) is the proper application of the phrase "money satisfaction." Early on, some courts interpreted "money satisfaction" to require the payment in full of a lienholder's claim from the proceeds of the sale.[83] This interpretation, however, is predominantly considered obsolete and inconsistent with the Bankruptcy Code, thus giving way to the majority view that section 363(f)(5) "allows trustees of an estate

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[81] *Id.* at 829–30 (stating debtor could sell asset free and clear of liens under 363(f)(5) if it can demonstrate ability to cramdown, and "trustee must demonstrate good faith to effectuate a cramdown").

[82] *See id.* at 829.

[83] *See In re* Grand Slam U.S.A., Inc., 178 B.R. 460, 461 (E.D. Mich. 1995) (noting interpretation of section 363(f)(5) by some courts as prohibiting assets from being sold without lienholder being paid in full).

to sell property free and clear of liens when a 'legal or equitable proceeding' exists that will force the lienholder to accept less than full money satisfaction for their interest."[84] Courts adhering to the majority rule reason that section 363(f)(5) does not require full payment because, pursuant to section 363(f)(3), a lien can always be discharged by payment in full of the underlying debt, and such an interpretation thus would render section 363(f)(5) redundant and unnecessary.[85]

Several courts that have held that payment in full is required have reconciled this apparent inconsistency by reasoning that section 363(f)(5) applies only to interests other than liens.[86] A limiting approach taken by other courts holds that full payment is required unless equitable considerations, such as the rehabilitation of the debtor, warrant permitting the extinguishment of liens for less than full money satisfaction.[87] These decisions, too, have been criticized on the basis that requiring payment in full would be duplicative of section 363(f)(3).[88]

Additionally, at least one court has noted, albeit in the context of 363(f)(3), that the general rule regarding asset sales in bankruptcy is that "the bankruptcy court should not order property sold free and clear of liens unless the court is satisfied that the sale proceeds will fully compensate secured lienholders and produce some equity for the benefit of the bankrupt's estate."[89] The court reasoned that this general rule was necessary to prevent the sale of substantially all of a debtor's assets prior to plan confirmation, and that sales of encumbered property for less than the face amount of the liens should be limited to the plan process under section 1129.[90] This

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[84] *Id.* at 462 (highlighting interpretation of majority).

[85] *See, e.g.*, Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), 391 B.R. 25, 42 (B.A.P. 9th Cir. 2008) ("We assume that [section 363(f)(5)] refers to a legal and equitable proceeding in which the nondebtor could be compelled to take *less* than the value of the claim secured by the interest."); *see also In re Grand Slam U.S.A.*, 178 B.R. at 462 (interpreting section 363(f)(5) to mean full money satisfaction is "inconsistent with requirements imposed for money satisfactions in other sections of the Bankruptcy Code," *i.e.*, section 363(f)(3)); *In re* Gulf States Steel, Inc. of Ala., 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002) (illustrating how interpretation would make section 363(f)(5) repetitious); *In re* Healthco Int'l, Inc., 174 B.R. 174, 176 (Bankr. D. Mass. 1994) (holding payment in full unnecessary under (f)(5) because "any lien can always be discharged by full payment of the underlying debt . . .").

[86] At least two courts have held that the term "interest" does not include liens, and therefore section 363(f)(5) does not apply in the context of sales free and clear of liens. *See, e.g., In re* Canonigo, 276 B.R. 257, 266 (Bankr. N.D. Cal. 2002); *In re* Beker Indus. Corp., 63 B.R. 474, 478 (Bankr. S.D.N.Y. 1986). This is the minority rule, however, as most courts apply section 363(f)(5) in the context of a sale of assets free and clear of liens. *See, e.g., In re Terrace Chalet Apartments*, 159 B.R. at 829 ("Section 363(f)(5) permits a sale free and clear of a *lien* if the creditor could be 'compelled' to accept a monetary satisfaction of the *claim*." (emphases added)).

[87] *See In re* Stroud Wholesale, Inc., 47 B.R. 999, 1003 (E.D.N.C. 1985) (noting in reorganization cases, "equitable considerations may dictate that creditors receive less than full satisfaction of their interests, or that such interests be secured by other collateral," but payment in full is required for sale free and clear in liquidation cases), *aff'd*, 983 F.2d 1057 (4th Cir. 1986); *see also In re* Wing, 63 B.R. 83, 85 (Bankr. M.D. Fla. 1986) (holding no equitable considerations existed to allow sale free and clear of liens where creditors would receive less than full satisfaction of interests).

[88] *See, e.g., In re Terrace Chalet Apartments*, 159 B.R. at 829 (explaining section 363(f)(5) not meant to require full satisfaction, as that would repeat section 363(f)(3)'s requirements).

[89] *In re* WDH Howell LLC, 298 B.R. 527, 534 (D.N.J. 2003) (quoting *In re* Riverside Inv. P'ship, 674 F.2d 634, 638–41 (7th Cir. 1982)).

[90] *See id.*

holding is the most consistent with the apparent pre-Code policy of generally not permitting sales free and clear of liens if the purchase price did not exceed the secured debt.

While not apparently addressed by the courts to date, a party might also question whether the "money satisfaction" element of section 363(f)(5) is satisfied when cramdown is the legal or equitable proceeding used to justify the availability of that section for a free and clear sale. In cramdown, typically a lender is given a note with a principal amount equal to the value of its collateral.[91] Whether receiving a note is actually a "money satisfaction" of the secured lender's claim, as opposed to payment of cash, could be subject to question.[92] At the same time, however, a debtor can cramdown a secured lender by simply paying it in cash at confirmation the value of its collateral as the "indubitable equivalent" of its secured claim, which would seem clearly to be a money satisfaction.[93] In those jurisdictions where courts require the debtor to show not that there is a hypothetical possibility of a cramdown, but rather a cramdown might be a real possibility in the case, a debtor might also have to show that the nature of its cramdown would be an actual payment in cash to the secured lender of the value of its collateral, rather than the provision of a note. Otherwise, the debtor might not be able to demonstrate that it has the ability to effectuate a money satisfaction of the secured lender's claim for less than its full amount.

3. Other Observations

Returning to the example noted above—where the debtor's assets are encumbered by blanket first and second liens, and certain assets are encumbered by a purchase money security interest—if the first lien lender is undersecured, cases such as *Clear Channel* and *WDH Howell* generally provide that the debtor cannot sell its assets free and clear of the first lien absent its consent.[94] This is because the debtor likely cannot satisfy section 363(f)(5) of the Bankruptcy Code, as there presumably is no nonbankruptcy legal or equitable proceeding that exists whereby the debtor could compel the first lien lender to accept a money satisfaction of its claim for less than the full amount of that claim.[95] This result, again, is consistent

[91] *See* 11 U.S.C. § 1129(b)(2)(A)(i) (2006) (providing secured lender can be crammed down if, among other things, plan provides for payments to it over time that have present value of secured lender's interest in collateral).

[92] *See, e.g., In re* Trans World Airlines, Inc., 322 F.3d 283, 290–91 (3d Cir. 2003) (suggesting any "interest in property" subject to monetary valuation could qualify as money satisfaction under 11 U.S.C. § 363(f)(5)).

[93] *See* 11 U.S.C. § 1129(b)(2)(A)(iii) (providing for cramdown of secured claims by providing indubitable equivalent of such claims).

[94] *See generally* Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), 391 B.R. 25 (B.A.P. 9th Cir. 2008); *see also In re* WDH Howell, LLC, 298 B.R. 527, 534 (D.N.J. 2003).

[95] *See Clear Channel*, 391 B.R. at 45–46 (noting court found no nonbankruptcy legal or equitable proceeding in which lender could be compelled by court to accept less than full amount of claim).

with apparent pre-Code practice, where courts were reluctant to authorize a sale of assets free and clear of the lien of an undersecured creditor.

In circumstances where the first lien lender is oversecured, but the second lien lender is undersecured, however, presumably the debtor can sell the property free and clear of the second lien, regardless of the bankruptcy court's view of section 363(f)(5) (as long as the court believes that such section applies to sales free and clear of liens), as the second lien lender could be compelled to take a money satisfaction for less than its claim in a state law foreclosure action commenced by the first lien lender. But where the sale proceeds will be insufficient to pay in full the first lien lender and the PMSI lender, another problem arises if both lenders do not consent to the sale. On its collateral, the PMSI lender by law has a first lien, while the lender with a blanket "first lien" on the debtor's assets actually has a second lien on the PMSI's lender's collateral.[96] As such, the PMSI lender can block a sale of this collateral under the interpretation of section 363(f)(5) set forth in cases such as *Clear Channel* and *WDH Howell*. Interestingly, the debtor could presumably sell those particular assets free and clear of the lien of the blanket "first lien" lender, as the PMSI lender could foreclose out that lender as to those assets in a state law foreclosure sale.

In fact, where a debtor, with the support of the blanket first lien lender, seeks to sell all of its assets as a going concern business, but for a price less than the amount necessary to pay the PMSI lender and blanket first lien lender, the PMSI lender may create significant issues for the debtor if it withholds its consent to the sale. While not selling the PMSI collateral would, in this instance, solve the legal issue, the buyer of the debtor's business may want these assets and may not be willing to purchase the debtor without them, or at least not at the price it otherwise has negotiated with the debtor. And to increase its leverage, the PMSI lender may argue to the bankruptcy court that it must be able to credit bid its debt in connection with the sale in order to get back its collateral, thereby raising the specter for the debtor and the buyer that the proposed sale to the buyer may not be consummated, as the buyer will not be able to obtain all of the debtor's assets if the PMSI lender is the highest bidder for its own assets pursuant to a credit bid.[97]

As such, in order to allow the sale to proceed, the debtor may be required to pay the PMSI lender in full in order to obtain its consent to the sale, or at least provide

[96] *See* U.C.C. § 9-324(a) (2000) ("[A] perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and . . . a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter.").

[97] Section 363(k) of the Bankruptcy Code provides:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k).

the PMSI lender with a favorable allocation of the purchase price between its collateral and the collateral of the blanket first lien lender in order to obtain such consent. The negotiation, of course, will involve the first lien lender as well, as an increase in value being paid to the PMSI lender will cause a reduction in the value being paid to the first lien lender as part of the sale. It would seem that the debtor and the first lien lender could avoid this result only by convincing the court that (1) the PMSI should not be allowed to credit bid for its assets, or that its credit bid would not be the highest and best bid, and (2) it should adopt the more liberal interpretation of section 363(f)(5) espoused by the courts. While section 363(k) of the Bankruptcy Code does allow a bankruptcy court to deny a creditor the right to credit bid in a sale "for cause," as described in the next section, generally courts have denied such right only in very limited circumstances.[98] As such, the court might not be comfortable simply denying the PMSI lender the right to credit bid.

The court could find, however, that the PMSI's lender's bid is not the best bid. While it might be the highest and best bid for its own collateral, if it causes the debtor potentially to lose a sale for its entire business — because the proposed buyer will not buy the business without the PMSI's lender's collateral — then an argument exists that the buyer's bid for the entire business is the highest and best bid the debtor has obtained, even if the PMSI lender's bid for its own collateral is the highest bid for those assets. Realistically, the buyer typically will not allocate its purchase price among the assets of the business, so it will not be known what the buyer is offering for the specific PMSI assets. However, where the purchase price for the business is less than the first lien and PMSI lender's claims, an inference exists that the buyer likely is not paying the full PMSI claim for the PMSI collateral unless that collateral is of particular value, in which case it would be reasonable to pay the PMSI lender in full, and all of the above issues would be avoided, as the sale could proceed as to that collateral under section 363(f)(3).

If the PMSI lender credit bids its debt in the sale, however, even if the all-asset buyer is chosen as the highest and best bid, the PMSI lender later will argue that its credit bid established the portion of the purchase price that should be allocated to its collateral, thereby allowing it to be paid in full. The law on allocation of a purchase price from the sale of collateral of more than one secured lender remains sparse and subject to uncertainty.[99] Therefore, it is not clear how a court would rule on this issue, especially since it may be clear that the amount of the PMSI claim did not truly represent the value of its collateral, even though the PSMI's lender's bid arguably established a base offer for its collateral in the sale process.

One of the leading cases on allocation of asset sale proceeds among multiple secured creditors, where the proceeds are insufficient to pay all lien claims in full, is *In re LTV Steel Company*.[100] In *LTV*, the court was faced with allocating the

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[98] *See* sources cited *infra* note 121.

[99] *See In re* LTV Steel Co., 285 B.R. 259, 266 (Bankr. N.D. Ohio 2002) (noting few cases exist dealing with allocation of sale proceeds, and no standard operating procedure exists for such allocation).

[100] 285 B.R. 259 (Bankr. N.D. Ohio 2002).

proceeds of a sale of substantially all of the debtor's assets, which were sold in bulk, but were encumbered by liens held by various secured creditors.[101] The court first determined that the value for each of the individual assets should be determined on a going concern basis, using a facility by facility analysis.[102] In so doing, the court rejected the approach advocated by certain objecting secured creditors, which would have compartmentalized the debtor's assets so that certain of the debtor's assets that were laden with environmental liability would have been disregarded for valuation purposes.[103] The court found that "going concern valuation" was the appropriate method because section 506(a) requires that "value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of the subject property."[104] Because the debtor's assets would be operated as a going concern, such was the appropriate valuation method.[105]

Having decided the appropriate valuation method, the court then reviewed extensive competing testimony from the parties regarding the value of each of the debtor's assets.[106] After determining a value, the court determined, without much discussion, that certain of the secured lenders should receive a pro rata distribution from the sale proceeds—i.e., a distribution based on each asset's portion of the proceeds to the total proceeds—while certain other secured lenders would receive from the sale proceeds a one hundred percent distribution based on the value of such assets.[107]

The other means by which the debtor could attempt to effectuate the sale free and clear of the PMSI lender's lien without its consent is simply to convince the court to adopt the so-called "liberal approach" to section 363(f)(5) espoused by cases such as *Grand Slam* and *Healthco*, whereby the debtor would simply have to argue that the PMSI lender could be required to accept a money satisfaction of its claim for less than full value in a hypothetical cramdown of that claim under section 1129(b)(2)(A) of the Bankruptcy Code.[108] If the court were not inclined to accept the purely hypothetical test, the debtor could at least demonstrate that such a cramdown truly could be effectuated in the particular case at issue, so that the court might as well allow a money satisfaction for less than the PMSI lender's claim in a section 363 sale instead.

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[101] *See id.* at 261.
[102] *See id.* at 268.
[103] *See id.*
[104] *See id.* (quoting 11 U.S.C. § 506(a)(1) (2006)).
[105] *See id.*
[106] *See id.* at 269–271 (discussing validity and reliability of testimonies regarding debtor's assets, including debtor's expert witness and objector's president and CEO).
[107] *See id.* at 278 (ruling in favor of debtor's adequately supported distribution method).
[108] *See In re* Grand Slam U.S.A., Inc., 178 B.R. 460, 462 (E.D. Mich. 1995) (pointing to section 1129(b)(2)(A) cramdown provision as legal proceeding forcing lienholder to accept less than full money satisfaction for their interest); *In re* Healthco Int'l., Inc., 174 B.R. 174, 176 (Bankr. D. Mass. 1994) (positing cramdown proceeding under section 1129(b)(2)(A), where lien can be satisfied by less than full payment, complies with section 363(f)(5) requirement).

While the more restrictive approach to section 363(f)(5) is in line with apparent pre-Code practice and the sentiment questioning why a debtor should be allowed to sell fully encumbered collateral without the secured lender's consent, proponents of the liberal approach can take the position that there actually is no harm to the secured creditor if, in the sale process, it is allowed under section 363(k) of the Bankruptcy Code to credit bid its debt. In that instance, if the secured creditor does not want the property sold for less than the debt, it has the ability to avoid that result by credit bidding its full claim and taking back its collateral. In a competitive sale process, credit bids are treated as effectively cash bids, where the collateral may be transferred to the lender in satisfaction of all or a portion of the secured debt.[109] Allowing a secured creditor to credit bid the allowed amount of its secured claim thus effectively gives the secured creditor rights analogous to those it would have outside of bankruptcy under applicable state law, i.e., rights of foreclosure.[110] As such, the liberal approach to section 363(f)(5) might not seem to be particularly problematic for a secured lender. However, as described below, credit bidding has its own complexities, especially where a syndicate of lenders, rather than one secured lender, is involved. Therefore, it may not be so simple to state that, since lenders can always credit bid their debt, there is no reason not to allow a debtor to sell assets free and clear of an undersecured lender without its consent.

II. CREDIT BIDDING IN SALES OF COLLATERAL

As noted, section 363(k) allows a secured creditor to credit bid its claim in a section 363 sale of its collateral unless the court orders otherwise "for cause." In particular, section 363(k) provides:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.[111]

A few threshold issues exist under section 363(k). For instance, the lender may only credit bid to the extent it has a lien on property that secures an allowed

[109] *See* Cohen v. KB Messanine Fund II, (*In re* Submicron Sys. Corp.), 432 F.3d 448, 459–60 (3d Cir. 2006) (citing cases ruling "creditors can bid the full face value of their secured claim under section 363(k)"); *see also In re* Finova Capital Corp., 356 B.R. 609, 625 (Bankr. D. Del. 2006) ("[A] secured lender's 'credit bid' is the functional equivalent of a 'cash bid' . . . [and] merely saves a step of payment by the lender, as buyer, to the lender, as seller and thus acts as a convenience.").

[110] *See In re* Sunflower Racing, Inc., 219 B.R. 587, 600 (Bankr. D. Kan. 1998) (ruling section 363(k) grants mortgagee rights, analogously granted under state law, to "bid at a foreclosure sale" and "own the property after foreclosure").

[111] 11 U.S.C. § 363(k) (2006).

claim.[112] Thus, disputes have arisen as to whether a lender has an allowed claim entitling it to credit bid.[113] Further, as noted, a court can deny the secured lender the right to credit bid "for cause," so courts have been required to interpret what may constitute cause to deny a credit bid altogether. Each issue is discussed below and involves a limitation to the right of the secured lender to credit bid its debt, thereby complicating whether a liberal interpretation of section 363(f)(5) should be accepted.

More importantly, however, recently two appellate courts have ruled that a debtor can sell collateral under a plan, rather than in a section 363 sale, and prevent the secured lender from credit bidding its debt in that transaction.[114] In addition, the courts have begun to issue rulings on whether a majority of a syndicate of lenders who want to credit bid for their collateral can effectuate a credit bid of the entire syndicate's debt without the unanimous consent of the lender group.[115] To the extent that the lenders in these circumstances cannot effectuate a credit bid for their collateral, again, the position that section 363(f)(5) should not be an impediment to a sale of fully encumbered property without secured lender consent may be less compelling.

A. Credit Bidding Allowed Secured Claims

Section 363(k) of the Bankruptcy Code only allows creditors to credit bid "allowed" secured claims.[116] Under section 502(a) of the Bankruptcy Code, when a creditor files a proof of claim, that claim is deemed allowed, unless and until a party in interest objects to the claim.[117] Prior to filing a proof of claim, however, the secured lender may not be deemed to have an allowed claim, unless the debtor has listed that claim in its bankruptcy schedules other than as being contingent, unliquidated, or disputed.[118] As such, to credit bid, a lender may have to file a proof

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[112] In *Submicron*, the Third Circuit settled the question of whether an undersecured lender's credit bid should be capped at the economic value of the secured creditor's claim under section 506(a) of the Bankruptcy Code, or whether a credit bid should be allowed in the full amount of the claim, irrespective of the claim's undersecured status. The Third Circuit allowed the lender to credit bid the full face amount of its claim, despite its undersecured position, holding that "logic demands that § 363(k) be interpreted in this way; interpreting it to cap credit bids at the economic value of the underlying collateral is theoretically nonsensical." *In re Submicron Sys. Corp*., 432 F.3d at 460; *see* 11 U.S.C. § 363(k).

[113] *See In re* McMullan, 196 B.R. 818, 835 (W.D. Ark. 1996) (stating bids could not be offset under section 363(k) where validity of liens and security interests was unresolved).

[114] *See In re* Phila. Newspapers, LLC, 599 F.3d 298, 318 (3d Cir. 2010); *In re* Pac. Lumber Co., 584 F.3d 229, 245–49 (5th Cir. 2009).

[115] *See In re* GWLS Holdings, Inc., No. 08-12430 (PJW), 2009 WL 453110, at *5–6 (Bankr. D. Del. Feb. 23, 2009) (upholding valid agreement giving agent authority to credit bid on behalf of lender group without unanimous consent).

[116] *See* 11 U.S.C. § 363(k) (allowing credit bidding "[a]t a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim . . .").

[117] *See id.* § 502(a) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.").

[118] *See* FED. R. BANKR. P. 3003, which provides that a creditor need not file a proof of claim to the extent a debtor lists a claim in its bankruptcy schedules other than as contingent, disputed, or unliquidated.

of claim, unless the debtor already has acknowledged that claim in an agreed amount or otherwise stipulated to the claim. Assuming a proof of claim is on file, the next issue is whether a creditor should be permitted to credit bid claims that are subject to a pending objection, or have not been allowed on a final basis. The trend among the cases is to fashion relief so as to preserve a secured creditor's rights to credit bid — typically allowing a credit bid in the full amount of the claim, while providing for the payment of cash by the creditor should the creditor's claim ultimately be disallowed in whole or part.[119]

B. "Cause" to Deny a Credit Bid

As stated, a court has the authority to deny a secured creditor from credit bidding in a section 363 sale for "cause."[120] There exists only scant case law addressing what constitutes "cause" to preclude a creditor from credit bidding. In what limited case law there is, however, it appears that courts will alter a creditor's right to credit bid only in situations of collusion, or when allowing a credit bid will chill the bidding process, potentially suppressing the ultimate sale price.[121]

C. Credit Bidding in Connection With Sales Under A Chapter 11 Plan

In two recent opinions, the Third and Fifth Circuits have denied secured lenders from credit bidding as part of the sale process under a plan to be confirmed pursuant to the debtor's cramdown powers under section 1129(b)(2)(A)(iii) of the Bankruptcy Code.[122] Section 1129(b) of the Bankruptcy Code allows a debtor to cramdown a plan of reorganization over the objection of a class of creditors or

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[119] *See In re* Octagon Roofing, 123 B.R. 583, 592 (Bankr. N.D. Ill. 1991) (allowing bank to credit bid in full amount of claim pending resolution of claim objection but requiring bank to post irrevocable letter of credit in amount of challenged portion of claim, guaranteeing payment in event objection succeeds); *see also In re* Miami Gen. Hosp., Inc., 81 B.R. 682, 688 (S.D. Fla. 1988) (approving credit bid sale in light of stipulation preserving trustee's right to challenge secured claim and creditor's obligation to pay cash in amount of any disallowed portion of claim); *In re* St. Croix Hotel Corp., 44 B.R. 277, 279 (Bankr. D.V.I. 1984) (permitting bank to credit bid full amount of claim pending resolution of adversary proceeding challenging claim with understanding that bank would have to pay cash for any amount of claim disallowed).

[120] *See* 11 U.S.C. § 363(k) (granting court power to prevent creditor from bidding in sale for cause).

[121] *See In re* Diebart Bancroft, No. 92-3744-45, 1993 WL 21423 *4 (E.D. La. Jan. 26, 1993) (upholding sale where no evidence of collusion sufficient to establish lack of good faith and selling price was fair); *In re* Theroux, 169 B.R. 498, 499 (Bankr. D.R.I. 1994) (denying trustee's proposed sale of liquor license for price substantially below market value, which would only benefit secured party and has specific purpose of wiping out interests of taxing authorities); Mark W. Wege & Jimmy F. Dahu, *Recent Developments in Asset Sales in Bankruptcy*, KING & SPALDING ENERGY FORUM, 9–10 (May 7, 2009), http://www.kslaw.com/Library/publication/AssetSalesBankruptcyEnergy_Wege.pdf (citing *In re* Propex, Inc., No. 08-10249 (Bankr. E.D. Tenn. Jan. 18, 2009)) (noting *Propex* court required pre-petition lenders to infuse cash prior to credit bidding to prevent bid chilling).

[122] *See In re* Phila. Newspapers, LLC, 599 F.3d 298 (3d Cir. 2010); *In re* Pac. Lumber Co., 584 F.3d 229 (5th Cir. 2009).

interest holders under certain circumstances.[123] Subsections (b)(2)(A)(i)-(iii) provide for the confirmation of a plan over the objection of a class of secured creditors, if the plan provides:

> (i) (I) that the holders of such claims retain the liens secured such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property; or
> (ii) for the sale, subject to section 363(k) of the Bankruptcy Code, of any property that is subject to the liens secured such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on the proceeds under clause (i) or (iii) of 1129(b)(2)(A); or
> (iii) for the realization by such holders of the indubitable equivalent of such claims.[124]

In *In re Philadelphia Newspapers, LLC*,[125] the debtors sought to conduct a going concern sale of their business pursuant to a plan of reorganization, and to have the plan approved under section 1129(b)(2)(A)(iii) of the Bankruptcy Code.[126] The debtors' stalking horse bidder was an insider whose bid would result in the following consideration conveyed to the debtors' secured lenders under the plan: (i) $37 million in cash, and (ii) the debtors' Philadelphia headquarters valued at $29.5 million.[127] The debtors' secured lenders were owed approximately $318 million.[128]

As part of their motion to have auction procedures approved in connection with the sale, the debtors sought to preclude their secured lenders from effecting a credit bid.[129] The bankruptcy court denied the debtors' request, finding that the secured lenders had a right to submit a credit in the full face amount of their claims in connection with the sale because sales under a plan are governed by subsection (ii) of 1129(b)(2)(A), and that section preserves the lender's right to credit bid.[130] The

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[123] *See* 11 U.S.C. § 1129(b) (allowing court's confirmation of plan when class has not accepted, if all other requirements of section 1129(a) are met and plan does not discriminate unfairly and is fair and equitable with respect to dissenting class).

[124] *Id.* § 1129(b)(2)(A)(i)–(iii).

[125] 599 F.3d 298 (3d Cir. 2010).

[126] *See id.* at 301–02 (discussing reorganization plan, which provided debtors' assets would be sold at public auction lien-free and under section 1129(b)(2)(A)).

[127] *Id.* at 301–02.

[128] *Id.* at 301.

[129] *Id.* at 302.

[130] *Id.*

district court reversed the bankruptcy court's holding, finding that the debtors still might be able to confirm a cramdown plan under subsection (iii) of section 1129(b)(2)(A), and, unlike subsection (ii), subsection (iii) does not preserve the right of a secured lender to credit bid in the plan confirmation context.[131]

On further appeal, the Third Circuit affirmed the district court's ruling.[132] The Third Circuit held that section 1129(b)(2)(A) is written in the disjunctive, and any of its three prongs can be used to confirm a plan over the objection of a secured creditor.[133] Section 1129(b)(2)(A)(ii) provides that a plan may be confirmed over the objection of a secured creditor if the plan provides for the sale of the debtor's assets in which such objecting creditor has an interest, *subject to section 363(k) of the Bankruptcy Code*, with the creditor's liens attaching to the proceeds of the sale.[134] Section 1129(b)(2)(A)(iii), on the other hand, simply provides that a plan may be confirmed so long as the plan provides for the realization by the objecting secured creditor of the indubitable equivalent of its claim.[135] For instance, in connection with the plan, the debtors could simply turn over to the secured lender the cash proceeds of sale, whatever amount the debtors' auction might produce, and then take the position that payment of such proceeds constitutes the "indubitable equivalent" of the lender's secured claim under section 1129(b)(2)(A)(iii), as the proceeds represent the value of that secured claim based on an auction of the relevant collateral.[136] The Third Circuit found that, because the debtors were moving for approval of their plan pursuant to subsection (iii), and not subsection (ii), the credit bidding rights referenced in subsection (ii) were not applicable, stating that "[a] plain reading of § 1129(b)(2)(A)(iii) therefore compels the conclusion that, when a debtor proceeds under subsection (iii), Congress has provided secured lenders with no right to credit bid at a sale of the collateral."[137]

In reaching its decision, the Third Circuit relied heavily on the holding in *In re Pacific Lumber Co.*,[138] which involved a plan transaction where the debtors' assets would be transferred to reorganized entities, which the Fifth Circuit determined to be effectively a sale.[139] Under the plan, the secured lenders received the full cash equivalent of their undersecured claims, but were not permitted to credit bid to attain the debtors' assets.[140] In overruling the secured creditors' objection to the plan, the Fifth Circuit found, like the Third Circuit, that, although the plan transaction was effectively a sale, the cramdown provisions of the Bankruptcy Code were

[131] *Id.* at 302–03.
[132] *Id.* at 301.
[133] *Id.* at 305–06 (stating use of "or" means subparagraphs (i)-(iii) of section 1129(b)(2)(A) are alternatives and not mutually exclusive of one another).
[134] *See id.* at 305 (citing 11 U.S.C. § 1129(b)(2)(A)(ii) (2006)).
[135] *See id.* at 305 (citing 11 U.S.C. § 1129(b)(2)(A)(iii) (2006)).
[136] *See id.* at 312–13 (approving proposed bid procedures, expecting value of lenders' secured interests to be determined by public auction).
[137] *Id.* at 311.
[138] 584 F.3d 229 (5th Cir. 2009).
[139] *See id.* at 245.
[140] *See id.* at 246–47.

written in the disjunctive.[141] And while subsection (ii) of 1129(b)(2)(A) provides a credit bidding right to a secured creditor, subsection (iii) does not.[142] Consequently, because the court found that the plan provided the secured lenders with the "indubitable equivalent" of their claims through the payment of the cash proceeds of the sale of the secured lenders' collateral, and therefore the plan could be confirmed under subsection (iii), the secured lenders did not have the right to credit bid in the sale.[143]

The *Philadelphia Newspapers* decision was appealed to the Supreme Court, but the Court denied certiorari.[144] Observers have argued that the decision is wrong for a number of reasons, and the decision contains a lengthy and vigorous dissent by Judge Thomas Ambro, a former bankruptcy practitioner.[145] Among other things, since section 1129(b)(2)(A)(ii) expressly addresses sales pursuant to a plan that a debtor may propose to cramdown on a secured lender, these parties assert that a court should only apply subsection (ii) when a sale is proposed under a cramdown plan.[146] Otherwise, there is no reason to have subsection (ii) at all, or even subsection (i) when a debtor proposes a deferred cash treatment under cramdown plan of the type contemplated by that subsection.[147] Instead, section 1129(b)(2)(A) could simply contain only subsection (iii), and the test for secured creditor cramdown in all cases would be whether under the plan the secured creditor is receiving the "indubitable equivalent" of its secured claim, whatever that might be in any particular instance.[148]

In addition, as set forth in Judge Ambro's dissent, section 1111(b) of the Bankruptcy Code is another method that Congress gave secured creditors to protect

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[141] *Id.* at 245.

[142] *See id.* (citing 11 U.S.C. §§ 1129(b)(2)(A)(ii)–(iii) (2006)) (explaining section 1129(b)(2)(A) allows secured property to "be sold free and clear of liens" as long as either creditor has right to credit bid under subsection (ii), or plan allows for the 'realization of indubitable equivalent of claims under subection (iii)).

[143] *See id.* at 246-47 (holding paying secured creditors plan's value of collateral in cash alleviated need for protections provided in clauses (i) and (ii) of section 1129(b)(2)(A) and rejecting secured creditors' argument that being denied right to credit bid prevented achieving indubitable equivalent because it stopped them from realizing potential increases in collateral's value).

[144] *See* Tom Hals, *Court Nixes Review in Philadelphia Newspapers Case*, REUTERS, April 9, 2010, http://www.reuters.com/article/idUSTRE6385OO20100409.

[145] *See, e.g.*, Barry E. Adler, *A Reassessment of Bankruptcy Reorganization After Chrysler and General Motors*, 18 AM. BANKR. INST. L. REV. 305, 314 n.8 (2010) (commenting *Philadelphia Newspapers* "may be part of a trend toward judicial disregard for the bankruptcy processes that protect priority"); *see also In re* Phila. Newspapers, LLC, 599 F.3d 298, 319 (3d Cir. 2010) (Ambro, J., dissenting) (rejecting majority's contention that 11 U.S.C. § 1129(b)(2)(A)(ii) is not exclusive method "through which a debtor can cram down a plan calling for the sale of collateral free of liens").

[146] *See, e.g., In re Phila. Newspapers*, 599 F.3d at 338 (opining all cramdown plans free of liens should exclusively apply 11 U.S.C. § 1129(b)(2)(A)(ii)).

[147] *But see In re Pac. Lumber Co.*, 584 F.3d at 245 (denying contention "allowing sales of collateral free and clear of liens" under section 1129(b)(2)(A)(iii) would render subsection 1129(b)(2)(A)(ii) superfluous).

[148] *See In re Phila. Newspapers*, 599 F.3d at 330 (Ambro, J., dissenting) (applying anti-superfluousness canon of statutory interpretation and stating if subsection (iii) of section 1129(b)(2)(A) could apply where subsections (i) and (ii) apply, statute would have just included language of subsection (iii), thereby precluding need for specifics of subsections (i) and (ii), such as presumptive right to credit bid under (ii)).

themselves from the undervaluation of their collateral.[149] Under section 1111(b), a secured creditor can treat its entire claim as being fully secured for purposes of cramdown under section 1129(b), even if the actual value of the collateral is less than the amount of the claim.[150] The protections of 1111(b), however, only exist when the collateral is *not* being sold (i.e., in a potential plan cramdown).[151] Section 1111(b) is not available when the property securing the lien is to be sold under section 363 of the Bankruptcy Code, or under a plan of reorganization.[152] Arguably, then, Congress intended that the protections of sections 1129(b)(2)(A)(ii) and 363(k) of the Bankruptcy Code would instead apply when property of the debtor is being sold.[153]

Only time will determine whether the decisions in *Pacific Lumber Co.* and *Philadelphia Newspapers* will become the law throughout the country. However, one school of thought is that the decisions are in many cases irrelevant.[154] First, the decisions apply only in the context of sales pursuant to a plan. As such, they do not affect section 363 sales themselves. Second, while a secured creditor may not be entitled to credit bid under those rulings, there is nothing to prevent the secured creditor from bidding cash. While the secured creditor would not be able to offset under section 363(k) of the Bankruptcy Code its purchase price obligation if it were the winning bidder, presumably in many cases that cash simply would be returned to the lender, producing the same result as if it had credit bid. Indeed, in the *Philadelphia Newspapers* case, the lenders who were denied the right to credit bid

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[149] *See id.* at 333 (stating section 1111(b) provides secured creditors with two facets of protection from undervaluation). Section 1111(b) of the Bankruptcy Code allows a nonrecourse secured creditor to be treated as a creditor with recourse against the debtor for any debt deficiency that exists because the collateral is worth less than the debt it secures. It then allows a secured creditor to forego that deficiency claim and elect to have its entire claim treated as if it were fully secured. *See* 11 U.S.C. § 1111(b) (2006) (codifying protection of nonrecourse secured creditor from undervaluation of claims against debtors); *see also In re* Nat'l Real Estate Ltd. P'ship-II, 104 B.R. 968, 973 (Bankr. E.D. Wis. 1989); *In re* DRW Prop. Co. 82, 57 B.R. 987, 991 (Bankr. N.D. Tex. 1986).

[150] *See* 11 U.S.C. § 1111(b); Margaret Howard, *Stripping Down Liens: Section 506(d) and the Theory of* Bankruptcy, 65 AM. BANKR. L.J. 373, 398 (1991) (noting section 1111(b) allows undersecured creditors to have claims treated as secured to full amount of debt and under cramdown debtor then must pay at least amount of secured claim at present value of at least value of collateral).

[151] *See In re DRW Prop. Co. 82*, 57 B.R. at 993 (holding section 1111(b) protections for creditor exist when debtor wants to keep property and is therefore effectively paying creditor price to use encumbered property, but if property is sold, then nonrecourse secured creditor no longer entitled to section 1111(b) protections).

[152] *See id.* at 992 (stressing second exception to section 1111(b), section 1111(b)(1)(A)(ii), "expressly provides that recourse treatment is denied to a nonrecourse claim holder where the property securing the claim is sold under section 363 prior to confirmation or is to be sold under the plan of reorganization").

[153] *See id.* at 993 (pointing to legislative history for notion that section 1111(b) does not apply to sale of property through section 363 or plan because secured party has ability to bid full amount of claim).

[154] *See* Robert J. Rosenberg, Michael J. Riela, Jason B. Sanjana & Emily B. Scharfman, Asset Sale Issues, Bankruptcy 2010: Views From The Bench, Georgetown University Law Center, 17–18 (on file with American Bankruptcy Institute), available at http://www.abiworld.org/committees/newsletters/assetsales/vol7num8/issues.pdf (noting *Pacific Lumber* and *Philadelphia Newspapers* may not really have effect on existing relationship between debtors and creditors in bankruptcy, as plans with "free and clear" sales and no rights of creditors to credit bid must still satisfy other plan confirmation requirements and, "even in section 363 sales, secured lenders do not have an irrevocable right to credit bid").

ultimately prevailed at auction in any case by submitting the highest cash bid at auction.[155] The question could be raised that, if the secured lender bid cash, how could the debtor confirm its cramdown plan under section 1129(b)(2)(A)(iii) of the Bankruptcy Code without paying that cash to the secured lender? Otherwise, how could the plan provide the secured lender with the "indubitable equivalent" of its secured claim, which arguably was determined by the secured lender's cash bid? The secured lender, of course, might not be particularly comfortable with paying in cash the amount of its claim for its collateral on the assumption that such cash will be returned to it under the plan. Even where that result is expressly provided for in the plan, there may be some delay between the payment of the purchase price and confirmation of the plan, thereby creating true cash requirements for the lender, as well as the risk that the plan might not be confirmed for any number of reasons, at which point the secured lender's cash would be trapped in the debtor's estate.

In addition, the plan might not provide for the return of the secured lender's cash to it in part or at all. For instance, even if one accepted the notion that payment in full of such cash is required to satisfy the "indubitable equivalent" cramdown standard of section 1129(b)(2)(A)(iii) of the Bankruptcy Code, under the logic of *Pacific Lumber Co.* and *Philadelphia Newspapers,* the debtor might be able to keep the cash and instead confirm a cramdown plan under section 1129(b)(2)(A)(i) by promising to make deferred cash payments to the secured lender over time of a present value equal to the purchase price for the assets. In this case, however, the debtor would have to convince the court that the secured lender was retaining its lien in the collateral, even though it was receiving title to the collateral.[156] In addition, with the collateral no longer in the possession of the debtor, the debtor might have to give the secured lender a lien in the cash received and any property acquired through the use of such cash in order to convince the court to approve a cramdown plan.[157]

In any case, where a syndicate of lenders, rather than one secured lender is involved, it may be difficult for the syndicate to simply pay cash for collateral that is being sold under a plan and see that cash returned to it. Even where the plan provides for such result, not all of the syndicate members may want to bid cash for the collateral or desire to have the collateral returned to them. And, presumably, no lender could be forced by the rest of the syndicate under the credit agreement to

[155] *See* Order Approving: (A) Second Supplement to the First Amended Disclosure Statement with Respect to First Amended Chapter 11 Plan as of October 27, 2009 (as Amended by the Second Amended Joint Chapter 11 Plan as of May 19, 2010); (B) Related Notice and Objection Procedures; and (C) Amended Forms of Ballots for the Solicitation of Votes to Accept or Reject the Second Amended Plan, *In re* Phila. Newspapers, LLC, No. 09-11204 (SR) (Bankr. E.D. Pa. May 19, 2010) (Docket No. 2090) (granting amendment to debtor's disclosure statement indicating, among other things, that plan provided for sale of substantially all of debtors' assets to lender entity); *see also* Harold Brubaker & Christopher K. Hepp, *Phila. Newspapers Sold to Lenders*, PHILADELPHIA INQUIRER, April 28, 2010 (noting lender as highest bidder).

[156] *See* 11 U.S.C. § 1129(b)(2)(A)(i) (2006) (requiring, among other things, in order to cramdown plan on secured creditor, such creditor must be entitled under debtor's plan to retain its liens in collateral).

[157] *See id.* (noting obligations of debtor to convey lien to creditor equal to cash value of collateral, if debtor transfers interest in that property to another entity).

actually bid its own cash for the collateral. Thus, decisions like *Pacific Lumber Co.* and *Philadelphia Newspapers* are troublesome for secured lenders that act as a syndicate under a credit facility, which was the case in each of those decisions.

D. Consent Issues Associated with Credit Bids by a Lender Syndicate

When a lender syndicate does retain the right to credit bid in connection with the sale of a debtor's assets, difficult issues still can arise. In particular, the issue arises, similar to the cases discussed in Part I.A above, as to whether, under the credit agreement, a majority of the lenders can force the entire syndicate to credit bid their debt to purchase the debtor's assets, even where some lenders may not want to participate in the purchase or oppose the lenders buying the debtor's assets.[158]

In *In re GWLS Holdings*,[159] the administrative agent under the debtors' first lien credit agreement had agreed, with the consent of most of the lenders, to purchase all of the debtors' assets through a credit bid in a bankruptcy auction.[160] A single hold-out lender objected to the sale, arguing that the administrative agent was not authorized to credit bid the full amount of the first lien debt absent unanimous consent of all first lien lenders.[161] In particular, the objecting bank argued that (i) the credit bid was effectively a waiver or amendment of the credit agreement, which required unanimous consent under the applicable loan documents, and (ii) each of the first lien lenders under the credit agreement had the right to enforce remedies with respect to the collateral individually.[162]

The court rejected these arguments and approved the sale.[163] In so ruling, the court interpreted the security agreement at issue as authorizing the collateral agent to dispose of collateral while exercising remedies under the first lien credit documents, and that such rights included the right to credit bid.[164] Moreover, like the courts in *Chrysler* and *Beal*, the court dismissed the "amendment" argument finding that the credit bid was not an amendment of the credit agreement, but rather was simply an exercise of its terms.[165]

Similarly, in *In re Metaldyne Corp.*,[166] the court affirmed an agent's right to affect a credit bid of the entire facility at the direction of the lenders holding 97% of the first lien debt, finding that the agent was authorized under the applicable credit documents to take such action since it "could 'exercise such powers as are delegated

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[158] *See supra* Part I.A (discussing challenges encountered when majority of lenders attempt to force entire syndicate to bid to purchase debtor's assets, without unanimous agreement).
[159] No. 08-12430(PJW), 2009 WL 453110 (Bankr. D. Del. Feb. 23, 2009).
[160] *Id.* at *2.
[161] *Id.* (naming Grace Bay as only objecting party to agreement whereby lenders authorized agent to purchase all debtors' assets).
[162] *Id.*
[163] *Id.* at *5–6.
[164] *Id.* at *5 (interpreting credit agreement and collateral agreement collectively).
[165] *Id.*
[166] 409 B.R. 671 (Bankr. S.D.N.Y. 2009).

to [the Administrative Agent] by the terms of [the Loan Documents] together with such actions and powers as are reasonably incidental thereto.'"[167] Like the previous cases cited herein, the court found that the credit bid was not an amendment of the existing credit facility such that unanimous lender consent was necessary.[168]

In *In re Westpoint Stevens*,[169] the first lien collateral trustee submitted a credit bid for all claims under the first lien credit facility at the direction of the "required lenders" under the first lien credit agreement.[170] A first lien lender holding approximately 40% of the first lien loans objected to the credit bid, arguing that the collateral trust agreement, which authorized the trustee or any secured party to bid for and become a purchaser of the collateral, should not be interpreted as including a right of the trustee to credit bid the entire facility, because the agreement did not expressly allow for such a credit bid by the trustee.[171] The court overruled the objection finding that the collateral trust agreement provided that the "required lenders" had the right upon an event default to direct the trustee to exercise any right, remedy, trust or power available to the trustee, which included a right to credit bid.[172]

Finally, the court in *In re Foamex International*[173] reached the same conclusion in an unpublished order, which authorized the sale of the debtors to their pre-petition secured lenders pursuant to a credit bid.[174] The court concluded, over the objection of a competing cash bidder, that the underlying credit documents authorized the administrative agent to exercise rights, at the direction of the requisite number of lenders, in the event of a default, including the right to credit bid.[175]

While, thus far, the courts seem to have consistently allowed administrative and collateral agents to credit bid the debt of an entire lender syndicate if directed to do so by the majority lenders pursuant to the terms of the credit agreement,[176] a minority lender might argue that these situations are more difficult conceptually than those in cases such as *Chrysler* or *Premier*, where the required lenders were merely consenting to the sale of the group's collateral to a third party or consenting to use of cash collateral. The argument would be that, in most lender syndicates,

[167] *Id.* at 678 (quoting *In re GWLS Holdings*, 2009 WL 453110, at *5).

[168] *See id.* (agreeing with court in *In re GWLS Holdings*, holding unanimous consent unnecessary for right to execute credit bid and only requiring unanimous consent for waivers and amendments to loan documents).

[169] No. 03-13532 (Bankr. S.D.N.Y.).

[170] *See generally* Transcript of Hearing, *In re* WestPoint Stevens, Inc., No. 03-13532 (Bankr. S.D.N.Y. June 29, 2005) (on file with authors), *rev'd on other grounds,* 333 B.R. 30 (S.D.N.Y. 2005), *rev'd*, 600 F.3d 231 (2d Cir. 2010).

[171] *See id.* at 227.

[172] *See id.* at 227–30.

[173] No. 09-10560 (Bankr. D. Del.).

[174] *See* Order Approving Sale, *In re* Foamex Int'l, Inc., No. 09-10560 (Bankr. D. Del. Apr. 9, 2009) (on file with authors).

[175] *See* Transcript of Hearing at 112, *In re* Foamex Int'l, Inc., No. 09-10560 (Bankr. D. Del. May 26, 2009) (on file with authors).

[176] *See, e.g., In re* GWLS Holdings, Inc., 2009 WL 453110, at *4–5 (Bankr. D. Del. Feb. 23, 2009) (holding syndicated credit agreement gave collateral agent right to credit bid on behalf of first lien lenders).

while an administrative or collateral agent may hold a lien for the benefit of the group, each lender is the owner and holder of its own debt.[177] Thus, while the credit documents may be relatively clear in authorizing the agent to act with respect to the collateral as directed by the required lenders under the agreement, it may be less clear that each lender has authorized the agent, at the direction of the required lenders, to bid that lender's debt, as the lender's separate property, in a credit bid by the entire group. In fact, a minority lender might argue that since section 363(k) of the Bankruptcy Code states that a secured creditor may bid in a section 363 sale and offset its purchase obligation against its debt,[178] in a technical sense the agent in these circumstances arguably is forcing each lender to make a cash bid that will be set off against the separate debt owed to each lender by the debtor.

Should a situation arise where only part of a lender syndicate credit bids for a debtor's assets, either because that group does not or cannot force the remainder of the lenders to credit bid, other difficult issues may arise. The purchasing lenders, like in *Chrysler*, may have the ability to force the entire syndicate to consent to the sale under section 363(f) pursuant to the credit documents. In that instance, the sale can be approved free and clear of the liens of the lender group. But since the purchasing lenders are credit bidding their debt, there will be no proceeds of sale to which the liens of the remaining lenders can attach. So, at least initially, the remaining lenders appear worse off than if they had participated in the credit bid. The entirety of their collateral has been transferred, so that the non-purchasing lenders become nothing more than unsecured creditors of the debtor. If the sale involves the sale of the debtor's business as a whole for less than the secured debt, then the remaining lenders may face effectively no recovery on their unsecured claims.

However, a typical syndicated credit transaction will have a "payment sharing" or similar provision, whereby the lenders have agreed as to what happens if some lenders in the group receive payment on their debt, by setoff or otherwise, in excess of their ratable share.[179] These provisions typically state that the lenders receiving the excess share are required to purchase participations in the debt held by the other lenders, or make such adjustments in the loan holdings under the facility as are equitable, such that the benefit of all payments made on the facility are shared by the lenders ratably in accordance with their original percentage ownership of the debt in the facility.[180] The lenders who decide to credit bid for a debtor's assets may

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[177] *See* Harbinger Capital Partners Master Fund I, Ltd. v. Wachovia Capital Mkts., No. 602529/08, 2010 WL 2431613, at *2 (N.Y. Sup. Ct. May 10, 2010) (explaining how members of loan syndicate each own portion of total debt).

[178] *See* 11 U.S.C. § 363(k) (2006) ("[T]he holder of [an allowed claim secured by a lien on property sold under 363(b)] may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.").

[179] *See, e.g., In re* Metaldyne Corp., 409 B.R. 671, 675 (Bankr. S.D.N.Y. 2009) (discussing provisions of syndicated lending agreement between secured lenders requiring distribution of sale proceeds *pro rata*).

[180] *See, e.g., In re* Enron Corp., 2005 WL 356985, at *7 n.32 (S.D.N.Y. Feb. 15, 2005) (quoting provisions of syndicated lending agreement requiring lenders receiving more than its ratable share to purchase participations in the debt).

assert that these payment sharing provisions do not apply to that situation, asserting that the credit bid is not a payment on the loan as contemplated by those provisions, but rather a voluntary purchase by the lenders of the assets of the debtor using the facility debt as the means of payments. These lenders might also assert that the non-participating lenders have waived the benefits of the payment sharing provisions by deciding not to participate in the credit bid.

To the extent that the payment sharing provisions are deemed to apply to the credit bid, however, it would seem that the end result could be to treat the non-participating lenders as if they had participated in that credit bid and as having their pro rata interest in the debtor's assets. If this were the determination made by a court, then, at least as a practical matter, there would be little utility in not allowing the majority lenders under a credit facility to effectuate a credit bid of the entire facility, as the result will be the same under the payment sharing provisions of the facility even if the majority cannot literally force the other lenders to credit bid their debt.

CONCLUSION

As the trend in chapter 11 bankruptcy proceedings continues toward quick paced asset sales and prepackaged bankruptcies, issues surrounding section 363(f), the provision that allows a debtor to sell its assets free of all liens and encumbrances, credit bidding under section 363(k), and related issues of consent to sales and credit bids by a syndicate of lenders will be increasingly implicated and litigated in the process. Although pre-packaged plans and 363 all-asset sales are not new concepts in chapter 11, the breadth and pace of such proceedings in recent history are raising interesting and challenging questions, particularly with regards to institutional secured lenders, who often are the parties most affected by these expedited bankruptcy cases.

As we have seen, with some of the most difficult issues, there is often little guidance from the courts, and even less binding authority to guide these disputes. The results for secured lenders on the variety of issues discussed above has been somewhat mixed, and the law at times may appear to be results oriented and highly fact intensive. Some of these issues can be mitigated by diligent lending lawyers through drafting, and in particular, the issues related to consent by a syndicate of lenders to a sale or submitting a credit bid.

Nevertheless, in the context of a credit bid by a syndicate of lenders, even with proper syndicate consent to a bid, a court may still deny the credit bid "for cause" if it appears that the bid will chill the bidding process. Moreover, as seen in *Philadelphia Newspapers*, a strict reading of section 1129(b)(2) may also have the effect of denying a secured creditor's right to credit bid in a sale conducted under a plan of reorganization.

The issues related to section 363(f), and in particular, section 363(f)(5), have also proven troubling from a secured lender's perspective. In the most liberal reading of the statute, it is difficult to determine a circumstance when a debtor would not be able to sell assets free and clear of a lender's liens over the objection of such lender pursuant to section 363(f)(5). Nevertheless, if the court's ruling in *Clear Channel* is any indication of a recent trend in interpreting section 363(f)(5), then perhaps there are far more narrow interpretations of the statute on the horizon. Only time will tell how courts will view this issue in the coming years.