SECTION 363 SALES: IS THE SYSTEM WORKING?

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I. Introduction.

In mid-January 2009, Bloomberg News asked several leading lights – Harvey Miller, Jamie Sprayregen, Larry Gottlieb, and Fifth Circuit Judge Posner – to do a podcast on "Is Chapter 11 Working".

By mistake they invited me.

The panel was united in the view that chapter 11 reorganizations are increasingly uncommon and chapter 11 liquidations are increasingly frequent. In the present crisis, liquidations are compelled by the utter lack of debtor-in-possession financing, but even if DIP-loans become available, we face a more systemic problem. Most debtors have pledged or mortgaged most of their assets. Many capital structures now feature first, second or even third and fourth liens.

The blanket lien puts the business at the mercy of the secured creditor. Assuming that the business is a corporation or limited liability company, the primary goal of an insolvent business' managers or directors is to avoid civil (sometimes criminal) liability for the debts of the business – principally payroll, benefits, and withholding taxes. Paying those debts requires cash; the secured creditor with a blanket lien has

control over the cash. The managers will do what the secured creditor wants, whether it is a bankruptcy liquidation or a foreclosure and dissolution under state law.

Secured creditor control is not only inevitable as a matter of economic reality, it is correct as a matter of legal theory.

Not only have debtors pledged most of their assets, the value of those assets is declining. Available economic data suggests we are living through first major ***deflation*** since the Great Depression. We have, of course, seen several real estate deflations, most notably in the early 1990s, but not since 1932 have we seen a decline in value of virtually every asset class – real estate, equity securities, debt securities, commodities and operating properties. This great deflation gives secured creditors the legal right to lift the stay and seize their collateral. Section 362(d)(1) lifts the stay "for cause, including lack of adequate protection" – which traditionally and undoubtedly means the decline in value of collateral.

Section 362(d)(1) itself reflects a constitutional mandate: Liens are property rights protected by the Fifth Amendment. Neither the Bankruptcy Code nor any other statute can deprive a secured creditor of its lien without compensation, and delaying foreclosure which property declines in value constitutes a deprivation of property in violation of the Fifth Amendment.[1]

Both practical reality and legal theory combine to provide a brutal truth: In a deflationary environment, bankruptcy in general and chapter 11 in particular must

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[1] *In re* Penn Central (Railroad Rail Reorganization Act Cases), 419 U.S. 102, 124 (1974) (forcing railroad to operate at a loss so that securityholders interests were diminished in value was a taking requiring compensation under the Constitution).

preserve collateral value for secured creditors, whether by reorganization or by organized sale; otherwise the secured creditors will either compel liquidation outside of bankruptcy or remove their collateral from the estate once in bankruptcy.

Thus to the extent chapter 11 preserves collateral values better than the alternative, chapter 11 "works". To the extent chapter 11 does not preserve collateral value for secured creditors, chapter 11 fails. Harvey Miller[2] and other commentators[3] are like King Canute when they clamor against the rising tide of secured creditor-controlled liquidations in chapter 11. The secured creditor is always faced with the following choice: "Do I liquidate my collateral through state court, or do I liquidate it through a sale in bankruptcy court?" [4]

Which brings us to Section 363 of the Bankruptcy Code.

II. The Statute.

In some specific ways, sale of collateral under the Bankruptcy Code is clearly superior to foreclosure and sale under state law.

For example, Sections 363(g), (h), (i) and (j) allow the sale of property free and clear of a spouse's dower and courtesy rights and the interests of joint tenants, tenants in common or tenants by the entirety. Where a spouse or a co-owner has not

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[2] Miller, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?* 78 AM.. BANKR. L.J. 153 (Spring 2004).

[3] Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L. J. 235 (Spring 2002); Clark II, *Debate Over Section 363 Sales Simmers Critics Say Process Provides Unfair 'Umbrella' for Secured Creditor,* TURNAROUND MANAGEMENT ASSOCIATION.HTM (Dec. 1, 2004).

[4] Bacon & Hollister, Friendly Foreclosures Offer Alternative to Section 363 Sales, UCC Article 9 Process is Underutilized Option, TURNAROUND MANAGEMENT ASSOCIATION.HTM (July 1, 2006).

signed the mortgage on real property, the mortgagee can through section 363 obtain a more efficient sale for greater value than it could by foreclosing on only the debtor's interest in state court.

With respect to simpler "interests in property" – such as junior liens -- the statute is less clear.

Section 363(f) provides for sale free and clear of interests as follows:

> **(f)** The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –
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> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
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> (2) such entity consents;
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> (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.
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> (4) such interest is in bona fide dispute; or
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> (5) such entity could be compelled, in a legal or equitable proceeding to accept a money satisfaction of such interest.

Section 363(k) provides that a secured creditor may "bid in" its lien at a sale under section 363(b):

> (k) 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.

Finally, Section 363(m) protects good faith purchasers:

> (m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the

pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

With a disturbing exception noted below, courts have applied Section 363(m) pretty rigorously to protect purchasers.

Though courts consider whether the sale is "for value" in determining "good faith"[5], purchase at an auction price is generally sufficient to show "value"[6], and an arms-length purchaser is protected even if the selling trustee mis-handles the auction, *Bace v. Babbit*, No. 07 civ. 2420, 2008 WL 800579, at *3 (S.D.N.Y., March 25, 2008) (trustee advertised property for sale as 0.62 acres, not 4.62 acres).

Courts also look to the integrity or "equity of the bidder's conduct in the course of the sale proceedings,"[7] but ***only*** during the sale proceedings[8], – the purchaser's previous purchases are not enough to show collusion or fraud,[9] and fraud by the purchaser 15 years earlier is not sufficient to show fraud in the instant sale.[10]

Read collectively, these three sections would seem to provide in bankruptcy court the basic minimum relief available in a state court foreclosure sale -- transfer of property free and clear of liens to a good faith purchaser, including a senior mortgagee who has bid in its lien, without fear of subsequent challenge.

Unfortunately, a recent decision by the Ninth Circuit Bankruptcy Appellate Panel has read Section 363 more closely to deprive senior lienors of the basic

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[5] *In re* Colony Hill Associates, 111 F.3d 269, 276 (2d Cir. 1997)
[6] Oren v. Kass, No. CV-04-4297, 2005 WL 2323232, at *8 (E.D.N.Y. Sept. 23, 2005).
[7] *In re* Colony Hill Assoc., 111 F.3d 269, 276 (2d Cir. 1997),
[8] Bace v. Babbit, No. 07 civ. 2420, 2008 WL 800579, at *2 (S.D.N.Y., March 25, 2008) *citing In re* Gucci II, 126 F.3d 380, 390 (2d Cir. 1997).
[9] *In re* Paul J. Schieffer, Inc. Civ. No. 3;08cv12, 2008 WL 4186944 (D.Conn., Sept. 11, 2008).
[10] *In re* Barbara Negosh, No. 06-CV-5617, 2007 WL 2775158, at *3 (E.D.N.Y., Aug. 22, 2007).

benefits of clean title and protection from appeal: in *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 Bankr. 25 (BAP 9th Cir. 2008).

III. Clear Channel

The particular facts of Clear Channel are illustrative of the secured creditor's choice: liquidation in or out of bankruptcy court.

The debtor, PW, LLC, was attempting to develop a mixed-use complex of luxury condominiums and retail space in Burbank, California, but failed to acquire all necessary parcels and went into default on its first mortgage with DB Burbank LLC ("**DB**"). Events unfolded as follows:

- July 2006 – DB commences foreclosure and obtains receiver.
- July – November, 2006: DB and debtor try and fail to negotiate pre-packaged plan.
- November 20, 2006: On the eve of scheduled foreclosure sale, debtor files for chapter 11. DB immediately moves for appointment of a trustee.
- December 27, 2006: Bankruptcy Court appoints trustee.
- January 2007: Receiver turns over all property to trustee.
- January –March 2007: Trustee determines that the proceeding is a "single asset real estate case" where DB would be entitled to relief from the stay and therefore negotiates with DB a "Binding Term Sheet" providing for (i) the sale of property free and clear of liens, (ii) DB's acting as "stalking horse" to bid in its $40,000,000 mortgage; and (iii) DB's payment of a "carve-out amount" of $800,000 to cover certain administrative fees and expenses, including those of the receiver and the bankruptcy trustee.
- March 20, 2007: Bankruptcy Court enters order establishing procedure for the sale of the property.
- March 22, 2007: Trustee moves to approve sale free and clear of liens.

- April 26, 2007: Bankruptcy Court approves sale free and clear of all liens, including Clear Channel's junior lien, over the objection of Clear Channel, holder of a $2.5 million junior "consensual lien".

- May 1, 2007: Clear Channel appeals.

- May 7, 2007: Auction produces three non-qualifying bids, with the highest at $25.25 million – well short of DB's $40 million mortgage. DB bids in its mortgage.

- June 15, 2007: DB closes sale. Clear Channel receives nothing.

- Post-Closing: DB pays more than $1.5 million, including the $800,000 carve out, $750,000 to a senior lien holder, and other amounts necessary to pay real estate taxes and costs of closing.

- July 18, 2008: Bankruptcy Appellate Panel upholds sale of property but reverses that portion of Bankruptcy Court's order stripping Clear Channel's lien from the property and remands for further findings.

- After July 18, 2008: DB settles with Clear Channel.

The Bankruptcy Appellate Panel held that Clear Channel's challenge to sale free and clear of its lien was ***not equitably moot*** because relief could be granted – its lien could be reinstated – and DB as a sophisticated purchaser should have known this result was possible. The Panel held that Clear Channel's challenge was ***not moot under Section 363(m)*** because the statute – reading its exact words – provides that

> ***reversal or modification on appeal of an authorization*** under subsection (b) or (c) of this section of a sale ... ***does not affect the validity of a sale***"

which does not protect provisions of the sale order other than those transferring title. Provisions stripping Clear Channel of its lien were not protected from modification on appeal. The Panel noted that Section 364(e) protects good faith debtor-in-possession lenders from modification, on appeal, of their liens, security interests and priorities, whereas Section 363(m) simply protected the sale.

Turning to the merits, the Panel held that the property could not be sold free and clear of Clear Channel's lien under Section 363(f)(3):

> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –
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> (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;

(Emphasis added.)

Some courts had read the phrase "aggregate value of all liens" to permit ***all*** sales of collateral to be free and clear of liens because secured claims are allowed only to the extent of the value of their collateral under sections 506(a) and (b), and section 506(d) voids any lien to the extent it does not secure an allowed claim.[11] Clear Channel refused to follow those precedents:

> This reading expands § 363(f)(3) too far. It would essentially mean that an estate representative could sell estate property free and clear of any lien, regardless of whether the lienholder held an allowed secured claim. We think the context of paragraph (3) is inconsistent with this reading. If Congress had intended such a broad construction, it would have worded the paragraph very differently. For this reason, many courts and commentators have rejected this approach.[12]

Finally, the Panel turned to Section 363(f)(5):

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[11] *See, e.g.*, *In re* Beker Indus. Corp., 63 B.R. 474, 476-77 (Bankr. S.D.N.Y. 1986); *In re* Terrace Gardens Park P'ship, 96 B.R. 707 (Bankr. W.D. Tex. 1989); *In re* Oneida Lake Dev., Inc., 114 B.R. 352 (Bankr. N.D.N.Y. 1990); *In re* WPRV-TV, Inc., 143 B.R. 315, 320 (D.P.R. 1991); Milford Group, Inc. v. Concrete Step Units, Inc. (*In re* Milford Group, Inc.), 150 B.R. 904, 906 (Bankr. M.D. Pa. 1992); *In re* Collins, 180 B.R. 447, 450-01 (Bankr. E.D. Va. 1995).

[12] *See, e.g.*, Richardson v. Pitt County (*In re* Stroud Wholesale, Inc.), 47 B.R. 999, 1002 (E.D.N.C. 1985), *aff'd mem.*, 983 F.2d 1057 (4th Cir. 1986); Scherer v. Fed. Nat'l Mortgage Ass'n (*In re* Terrace Chalet Apartments, Ltd.), 159 B.R. 821 (N.D. Ill. 1993); *In re* Perroncello, 170 B.R. 189 (Bankr. D. Mass. 1994); **[**33]** *In re* Feinstein Family P'ship, 247 B.R. 502 (Bankr. M.D. Fla 2000); *In re* Canonigo, 276 B.R. 257 (Bankr. N.D. Cal. 2002); Criimi Mae Servs. Ltd. P'ship v. WDH Howell, LLC (*In re* WDH Howell, LLC), 298 B.R. 527 (D.N.J. 2003); *see also* *In re* Healthco Int'l, Inc., 174 B.R. 174 (Bankr. D. Mass. 1994); 3 COLLIER ON BANKRUPTCY ¶ 363.06[4][a] (Alan N. Resnick & Henry J. Sommer eds., 15th Ed. Rev. 2008).

> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –
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> (5) such entity could be compelled, in a legal or equitable proceeding to accept a money satisfaction of such interest.

The Panel parsed Paragraph (5)

> to contain at least three elements: that (1) a proceeding exists or could be brought, in which (2) the nondebtor could be compelled to accept a money satisfaction of (3) its interest.[13]

The Panel held that "interest" included "lien,"[14] but the fact that liens can always be satisfied with money was not enough: To strip a lien or interest under section 363(f)(5), the trustee had to show that a proceeding existed to compel satisfaction of the lien or interest with less than full payment:

> It is not the amount of the payment that is at issue, but whether "a mechanism exists to address extinguishing the lien or interest without paying such interest in full.[15] . . .
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> We . . . hold that the bankruptcy court must make a finding as to the existence of such a mechanism and that the trustee must demonstrate how satisfaction of the lien "could be compelled . . . .[16]
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> [B]ecause of the bankruptcy court's incorrect interpretation of the statute, we remand this case for further proceedings consistent with this disposition. This will allow the parties to attempt to identify a proceeding under nonbankruptcy law (if one exists) that would enable them to strip Clear Channel's lien and make the sale of PW's property to DB free and clear under § 365(f)(5).[17]

Clear Channel is wrong.

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[13] 391 Bankr. at 41.
[14] Id at 41-42.
[15] 391 Bankr. at 43, *quoting In re* Gulf States Steel, 285 Bankr. at 508.
[16] 391 Bankr. at 45.
[17] 391 Bankr. at 47.

A simple foreclosure under California law is a "proceeding under nonbankruptcy law that would enable [the trustee and DB] to strip Clear Channel's lien and make the sale of PW's property to DB free and clear." Given that a foreclosure proceeding was DB's alternative to proceeding under Section 363(f), I submit that Section 363(f) must be read to include state law foreclosure as such a proceeding.

This argument was not made to the Bankruptcy Appellate Panel.

Instead of referring to foreclosure proceedings under state law, the Clear Channel appellants vainly argued that a ***cram-down plan*** under Section 1129(b)(2)(A) is a "proceeding" that could force a lienor to accept money in satisfaction of its lien.[18] The Panel rejected the argument on the ground that sales under a plan have "safeguards" not present in Section 363(f), which is true but beside the point. More pertinent is that sales under a plan are accomplished under Section 1123(a)(5)(D), which provides for the sale of property free and clear of any lien "notwithstanding any otherwise applicable bankruptcy law."[19] Section 363(f) contains no such authority to override non-bankruptcy law. Indeed, since Section 363(f)(1) authorizes sales free and clear ***to the extent permitted under applicable nonbankruptcy law,*** Section 363(f)(5) cannot be interpreted as incorporating the cramdown power to sell free and clear ***notwithstanding applicable nonbankruptcy law***. That interpretation translates into "sales free and clear are permitted whenever permitted or forbidden by applicable nonbankruptcy law."

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[18] 391 Bankr. at 46 & n. 28, *citing In re* Gulf States Steel, 285 Bankr. 497, 508 (N.D. Al. 2002); *In re* Grand Slam USA Inc., 178 B.R. at 176; *In re* Terrace Chalet Apts., 159 Bankr. 821, 829 (N.D. Ill. 1993)..

[19] *See, e.g., In re* FCX, Inc., 853 F.2d 1149, 1154 (4th Cir. 1988) ("[S]ection 363(b)(1) . . . (is) substantively different from Section 1123(a)(5)(D) [because it is not] an empowering statute

One could also argue that the Panel erred in reading Section 365(f)(5) to require that a proceeding for sales free and clear of a junior lien be a proceeding under ***nonbankruptcy*** law, and that bankruptcy itself is "a proceeding". That interpretation translates into "sales free and clear are permitted whenever the Code otherwise permits them" -- but if Congress had wanted to say that, Congress could have done so.

There is a reason that the *Clear Channel* appellants did not cite to state court foreclosure: Almost no one else does.

After spending a lot of time and money on LEXIS searches, I have found only one decision – *In re Gulf States Steel*[20] – and only one article[21] that cite simple foreclosure as a proceeding that could force a junior lienor to accept a money satisfaction of its interest.[22] This is particularly puzzling given citation to state foreclosure law in the debate over whether property can be sold free and clear of a ***lease***.[23] COLLIER'S commentary on Section 363(f)(5) states only that

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[20] 285 Bankr. 497, 508 (Bankr. N.D. Al. 2002) at 508. *Cf. In re* Dulgerian, 2008 Bankr. LEXIS 248, 49 B.C.D. 136 (Jan. 25, 2008), holding that because foreclosure would not eliminate an easement, the trustee could not sell property free and clear of an easement under Section 363(f)(5).

[21] Keney, *Misinterpreting Bankruptcy Code Section 363(f)*, 76 AM. BANKR. L. J. 235, 252 n.64 (2002) ("Foreclosure sales resulting from judicial proceedings seem to fall directly within the words of the statute")

[22] The Bankruptcy Court in *In re Roberts*, 249 Bankr. 152 (Bankr. W.D. Mich. 2000), cited Michigan foreclosure law as not allowing a mortgagee to foreclose out a second lienor's right of redemption as a reason not to permit a sale free and clear under § 363(f).

[23] *See* Precision Industries v. Qualitech Steel SBQ LLC, 2001 U.S. Dist. LEXIS 8328 (S.D. Ind. April 24, 2001), rev'd 327 F.3rd 537 (7th Cir. 2003):

> As for New Qualitech's assertion that the reference to "applicable nonbankruptcy law" in Section 365(h) should be read to bar lessees from retaining rights under a lease that could be extinguished through foreclosure under state law, the short answer is that a sale of assets of a going (but floundering) concern in bankruptcy is not a foreclosure sale. . . . By purchasing assets rather than going through a foreclosure, the buyer obtained a going business and some important benefits, including the right to have the debtor assume any *favorable* contracts or leases and assign those to the buyer. Having chosen that form of transaction, the buyer must take the bitter with the sweet.

> Applicable nonbankruptcy law may recognize a monetary satisfaction when the lienholder is to be paid in full out of the proceeds of the sale or otherwise. Thus, a sale free of a first mortgage might be approved when the proceeds are sufficient to pay in full the first mortgagee and the second mortgagee has consented to the sale.

I can not fathom why no one cites state court foreclosure as a proceeding which compels a junior lienor to accept monetary satisfaction of its lien.[24]

With respect to personal property, the Uniform Commercial Code specifically authorizes the holder of a foreclosing senior security interest to sell property free and clear of junior security interests under Section 9-617(a)(3) and pay junior interests only proceeds exceeding its own secured claim. Sections 9-608(a)(1)(C); 9-615(a)(3).

With respect to real property:

> It is a fundamental principle of mortgage law that: "A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law. Foreclosure does not terminate interests in the foreclosed real estate that are senior to the mortgage being foreclosed." RESTATEMENT (THIRD) OF PROPERTY, MORTGAGES § 7.1. The buyer at a foreclosure sale acquires the interests of previous owners of the real estate and in so doing acquires a title free and clear of all other properly joined interests that were subsequent in time - or junior - to the foreclosed lien. Id. cmt. a.[25]

Id at *46-47. As noted, the Seventh Circuit reversed and ruled that the property could be sold free and clear of the tenant's lease. *See also* Alces, *Unexpired Leases in Bankruptcy: Rights of the Affected Mortgagee*, 35 U. Fla. L. Rev. 656, 674-75 (1983)

[24] Sometimes the blindness is astonishing. In *Scherer v. Federal National Mortgage Association (In re* Terrace Chalet Apartments), 159 B.R. 821, 824 (N.D. Ill. 1993), the district court rejected the junior lienors' argument that state law foreclosure procedures applied in bankruptcy court, but then failed to cite state law foreclosure as a proceeding that would qualify under § 363(f)(5).

[25] Saastopankkien Keskus-Osake Pankki (Skopbank) v. Allen-Williams Corp., 7 F.Supp. 2d 601, 607 (D. V.I. 1998).

Reading Section 363(f) to preclude sales free and clear of liens is bizarre given both the legislative history of the Code and its truly ancient antecedents.

The Bankruptcy Code had two parents – the bill drafted by the Commission on the Reform of the Bankruptcy Laws, introduced in the 94th Congress as H.R. 31, and the bill drafted by the National Conference of Bankruptcy Judges, introduced as H.R. 32. Section 5-203(b) of H.R. 31 (the Commission Bill) provided that property of the estate:

> may be sold . . . free of any lien or of any other interest for which the holder can be compelled to take a money satisfaction, if the holder of the lien or other interest is ***fully protected***, and the lien or interest shall attach to the proceeds. (emphasis added)

Section 5-202(b) of H.R. 32 (the Judges' Bill) was word for word the same except that the holder of the lien had to be "***adequately protected***" instead of "fully protected.[26]

The Commission's commentary to Section 5-203(b) of H.R. 31 confirms the obvious:

> Subdivision (b) codifies case law insofar as it recognizes the right of the trustee to sell the property of the estate free and clear of liens and other interests that can be reduced to dollars. See Advisory Committee's Note to paragraph (3) of subdivision (a) of Proposed Rule 606. The court is, however, taken out of the picture unless a dispute arises. Notice is required to the holders of the interests to be affected.[27]

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[26] Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 94th Congress, 1st and 2nd Sessions on H.R. 31 and 32 (Bankruptcy Act Revision) Appendix 1, Serial No. 27, Comparing H.R. 31 with H.R. 32 (September 2, 1975), *re-printed in* A. RESNICK & E. WYPYSKI, 7 BANKRUPTCY REFORM ACT OF 1978 – A LEGISLATIVE HISTORY Document 31.
[27] Reprinted in COLLIER ON BANKRUPTCY (L. King, 15th Ed.) App. Pt. 4(c) at App. Pt. 4-764.

The reference in both H.R. 31 and H.R. 32 to "any lien or . . . any other interest for which the holder can be compelled to take money satisfaction" shows that liens were clearly intended to be covered in the final Section 363(f)(5).[28] So does the version of Bankruptcy Rule 606(b)(3) referred to in the Commission Report:

> (3) *Sale free of Lien or Other Interest*. – A proceeding to sell property free of a lien, or of any other interest for which the holder can be compelled to take a money satisfaction, is governed by the Rules in Part VII.

Construing foreclosure as the "proceeding" sufficient to satisfy section 363(f) does not swallow the rest of the statute. There are "interests" that state foreclosure proceedings cannot satisfy through a money judgment – such as a senior easement.[29]

Finally, *Clear Channel* marks a departure from well over a century of bankruptcy jurisprudence.

As far back as 1874, the Supreme Court held

> Beyond all doubt the property of a bankrupt may, in a proper case, be sold by order of the bankrupt court free of encumbrance . .[30]

In 1931, the Supreme Court in *Van Huffel v. Harkelrode* held that a bankruptcy court had inherent power to sell property free and clear of liens even though the Bankruptcy Act of 1898 lacked any statutory authority for sales free and clear:

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[28] Some decisions have taken the reference to "liens" in Section 363(f)(3) and the reference to "interest in property" in Section 363(f)(5) as indicating that liens are different from interests and not subject to Section 365(f)(5). This interpretation flies in the face of the Bankruptcy Code. Section 101(37) defines "lien" as "interest in property" and many critical sections dealing with liens, such as Section 361 (adequate protection), Section 362(d)(1) (relief from the stay) refer to "interest in property" as including a lien.
[29] *In re* Dulgerian, 2008 Bankr. LEXIS 248, 49 B.C.D. 136 (Jan. 25, 2008).
[30] Ray v. Norseworthy, 90 U.S. 128, 135-37 (1874)

> The present Bankruptcy Act (July 1, 1898, 30 Stat. 544, c. 541), unlike the Act of 1867, [fn omitted] contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances. We think it clear that the power was granted by implication. Like power had long been exercised by federal courts sitting in equity when ordering sales by receivers or on foreclosure. [fn omitted] First National Bank v. Shedd, 121 U.S. 74, 87; Mellen v. Moline Malleable Iron Works, 131 U.S. 352, 367. The lower federal courts have consistently held that the bankruptcy court possesses the power, stating that it must be implied from the general equity powers of the court and the duty imposed by § 2 of the Bankruptcy Act to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto.[31]

There is no dust on *Van Huffel* as authority – it was cited by the Second Circuit its landmark decision upholding the Johns-Manville Plan's transfer of insurance policies to a litigation trust free and clear of interests in the policies.[32]

Clear Channel is worse than wrong, it is unfortunate.

The mootness decision is unfortunate because it ignores the actions DB took in reliance on the order transferring title. DB bid in its lien; it would never have done so – and become subject to the previously inferior Clear Channel lien -- except in reliance on the order's lien-stripping provisions. Indeed, there is a perfectly good statutory argument that DB's rights to adequate protection ***required*** sale free and clear of Clear Channel's junior lien under section 365(e):

> (e) ***Notwithstanding any other provision of this section***, at any time, on request of an entity that has an interest in property . . .sold . . ., the court, with or without a hearing, shall prohibit or condition such . . . sale as is necessary to provide adequate protection of such interest.[33]

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[31] Van Huffel v. Harkelrode, 284 U.S. 225, 227-28 (1931). *See also In re* Penn Central (Regional Rail Reorganization Act Cases), 419 U.S. 102, 124 (1974) (Act could constitutionally provide for sale free and clear so long as liens attached to proceeds of sale).

[32] MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 93 (2nd Cir.), *cert. denied*, 488 U.S. 868 (1988).

[33] *See* Scherer v. FNMA, 159 Bankr. 821, 828 n.3 (N.D. Ill. 1993) (Taking no position on whether first lienor's right to adequate protection under Section 363(e) would require sale free and clear of a second lien.)

Clear Channel also ignored the fact that DB spent money it was not obliged to spend in reliance on the court order conveying title free and clear of Clear Channel's liens. DB would never have done so except in reliance on the order stripping the lien. DB's money has been disbursed – the receiver has his cash, the trustee has hers, other expenses of closing have been paid. Nowhere does the Panel suggest how those disbursements are to be reversed.

The Panel's mootness decision was doubly unfortunate because it did not distinguish between third party buyers and the existing mortgagee. Under applicable non-bankruptcy law, a senior mortgagee who bids in its lien is generally ***not*** qualified to be a "bona fide purchaser" and thus cannot moot out objecting junior lienors.[34] Unaffiliated cash purchasers, however, *are* bona fide purchasers protected by the mootness doctrine against the challenge by junior lienors.[35]

Taken literally, *Clear Channel* means that a bankruptcy court cannot ever convey clean title to a purchaser unless every known lienholder consents under Section 363(f)(2) or the order is entered without objection -- and no lienholder files an appeal. There is even authority that failure to object does not constitute consent under Section 363(f)(2) [36], so the cautious buyer will not close on entry of the order but wait until the time to appeal has expired – even if no lienor has objected. By contrast, a junior lienor

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[34] G. NELSON & D. WHITMAN, 1 REAL ESTATE FINANCE LAW § 7.20 at 615 (3rd Ed. 1993).
[35] *In re* March, 988 F.2d 498, 499 (4th Cir. 1993) (Second mortgagee's failure to obtain stay of foreclosure sale moots appeal of foreclosure).
[36] There are at least two decisions finding that failure to object does not constitute "consent" under section 363(f)(2). *In re* DeCelis, 349 Bankr. 465 (Bankr. E.D. Wisc. 2006); *In re* Roberts, 249 Bankr. 152 (W.D. Mich. 2000).

who receives notice of a state foreclosure proceeding and fails to appear can have no possible objection to sale free and clear of its lien.[37]

As the Panel noted, *Clear Channel* was a single asset real estate case. DB could have obtained relief from the automatic stay, completed its foreclosure in state court and acquired the property by bidding in its lien – at which point it would have had title free and clear of Clear Channel's lien. There were peculiar facts in Clear Channel that deterred the first lienor from simply obtaining relief from the stay and proceeding in state court,[38] but that is what will happen next time. After *Clear Channel*, any cautious senior lienor will avoid using the bankruptcy court to sell its collateral, and any cautious buyer of collateral will insist on taking title through state court foreclosure. I have already heard from one title company that it will not provide a clean title insurance policy to a purchaser under section 363 if an appeal is pending.

IV. Deficiencies in § 363(f)(3): the Non-Cash Price.

Section 363(f)(3) permits a sale free and clear of liens if "the price at which such property is to be sold is greater than the aggregate value of all liens on such property." How should that language be interpreted – how should the statute be applied -- when the price is not paid in cash?

WestPoint Stevens, Inc., a sheet and towel manufacturer, had to grapple with that issue.

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[37] G. NELSON & A. WHITMAN, 1 REAL ESTATE FINANCE LAW § 7.18 at 609 (3rd Ed. 1993).

[38] The property subject to the first mortgage was adjacent to a parcel which was necessary to develop the first mortgagee's collateral. The debtor had a contract to buy the adjacent parcel; that contract could be enforced only through bankruptcy proceedings.

All of WestPoint Stevens' assets were pledged to a debtor-in-possession facility and two pre-petition credit facilities:

- a $489 million first lien loan of which approximately 60% was held by several funds (the "**Majority 1st Liens**"), and approximately 40% held by Carl Icahn; and
- a $167 million second lien loan of which approximately 51% was owned by Mr. Icahn's entity.

On the petition date, WestPoint Stevens' assets had a value in excess of the first and second lien debt. However, over the next 18 months the textile industry cratered, leaving the second lien credit facility dramatically undersecured and in possession of a priority claim for the diminution in the value of its collateral. WestPoint Stevens lacked both the cash necessary to pay its priority claims (including the DIP loan), and the projected cash flow necessary to service new secured debt sufficient to pay off the first lien lenders. WestPoint Stevens had to satisfy first and second lien facilities with equity. Icahn and the Majority 1st Liens each wanted enough equity to control the company, but neither was prepared to invest enough to cash out the other and each had enough first lien claims to ensure that the first lien class would reject the plan.

WestPoint Stevens could not cram down the first lien debt with equity because a secured class cannot be forced to equity in a reorganized debtor as the "indubitable equivalent" its claims.[39]

[39] The enacted version of Section 1129(b)(2)(A) did not include provisions in earlier versions of the statute that allowed a cramdown of secured claims with equity, and the joint statements of Congressman Edwards and Senator DeConcini that collectively constitute the equivalent of a "Conference Report" on the Code are explicit: "Unsecured notes as to the secured claim or equity securities of the debtor would not be the indubitable equivalent." 124 Cong. Rec. H 11,103 (Sept. 28, 1978), S 17,420 (Oct. 6, 1978).

Instead, WestPoint Stevens agreed to sell its assets to an Icahn entity in return for cash, common stock and subscription rights. WestPoint Stevens asked the bankruptcy court to approve the sale, value the proceeds and allocate the proceeds between the first and second lien lenders, in effect forcing the first lien lenders to take unregistered (and hence illiquid) equity securities, constituting a minority interest in the new company, in full satisfaction of their claims.

The Bankruptcy Court found that the total value of cash, stock and subscription rights available to pay the first and second lien lenders totaled $575.8 million, enough to satisfy the first lien lenders and distribute subscription rights with a value of approximately $95 million to the second lien lenders, and approved the sale free and clear of all liens to Icahn's entity.

The Majority 1st Liens appealed and the district court reversed, holding that the bankruptcy court had no power, outside of a plan, to value non-cash proceeds of collateral and then use that value to compel a secured creditor to accept non-cash payment as payment in full. Instead, the district court held that the non-cash proceeds must be sold for cash, and the cash remitted to the first lien creditors until they were paid in full.

Much of the *WestPoint Stevens* litigation concerned an intercreditor agreement. The Majority 1st Liens argued that the intercreditor agreement entitled them to receive cash payment in full before the seconds received any value. Icahn argued that the intercreditor agreement permitted the satisfaction of the first lien creditors with non-cash collateral at a value set by the court. In future cases there may not be an intercreditor agreement and junior lienors may attempt to distinguish *WestPoint Stevens* on that ground. That is too narrow a focus. A first lienor's documentation will always provide for payment in full and in cash. Section 363(f)(3) either does or does not override such language – that is, either it provides for satisfaction of a lien non-cash proceeds or it does not. *WestPoint Stevens* holds that the section contains no such power. The holding seems natural but is in fact quite problematic.

Many a lien is held by an agent on behalf of multiple lenders or an indenture trustee on behalf of multiple noteholders. The lenders or noteholders may maximize their recovery by bidding their lien, plus cash to pay senior encumbrances and encumbrances which, though junior, the lenders may wish to satisfy to preserve the going concern value of their collateral. (For example, lenders with a blanket lien on property, plant, equipment, inventory and accounts may well wish to pay trade creditors with junior reclamation liens on the inventory or mechanics lienors with liens on the plant, because they will need to business with the trade creditors or mechanics lienors in the future.)

A majority of the lenders or noteholders may direct the agent or trustee to acquire title to the property on behalf of the lenders or noteholders, but the agent or trustee will be reluctant to do so if the property has any embedded liabilities such as environmental claims. In the alternative, the majority lenders or noteholders will form a new entity to bid for the property with its own equity, and direct the agent or indenture trustee to accept that equity as full payment for the collateral.

If *WestPoint Stevens* is right – if the Section 363(f)(3) does not allow sale free and clear of a lien when the price is paid in securities – then the majority lenders' acquisition vehicle cannot acquire the collateral free and clear of the lien unless the loan agreement or indenture allows majority lenders (or noteholders) to authorize release of the lien. Hold-out lenders or noteholders can impair the acquiror's ability to convey clean title to the next purchaser.

It is not clear whether Icahn could have crammed down the first lien credit facility with equity of the acquiring company under a plan of reorganization. As noted above, legislative history states that equity or unsecured notes cannot constitute the "indubitable equivalent" of a secured claim – and therefore cannot be used to cram down secured creditors under section 1129(b)(2)(A)***(iii)***. However, a secured class can be crammed down through the

sale of collateral so long as they receive the proceeds under section 1129(b)(2)(A)***(ii)*** – and there is no legislative history that requires the proceeds to be cash. If Walmart, for example, had acquired the assets of WestPoint Stevens in return for tradable shares of Walmart stock, it would be silly to argue that Walmart stock could not be used to "cram down" dissenting first lien creditors under section 1129(b)(2)(A)(i)(II). Whether the stock of an entity formed for the purpose can likewise satisfy the section remains an open question.

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V. Other Deficiencies in Section 363(f).

Even if *Clear Channel* is overruled in the Ninth Circuit, or rejected by other jurisdictions, its close reading of Section 363(f) exposes other deficiencies in the statute.

With respect to liens, I have tried to demonstrate that Section 363(f)(5) allows the sale of collateral free and clear of a junior lien. The same is not true of a senior lien. With respect to personal property, the U.C.C. sections cited above clearly state that foreclosure and sale satisfies the security interest of the foreclosing party and any security interests junior thereto – but NOT any security interest senior to the foreclosing party. With respect to real property, "The general rule is that the holder of paramount lien cannot be made a party to a foreclosure action without his consent."[40]

Inability to sell property free and clear of a senior lien could have substantial real world consequences. As noted above, many indentures and bank credit agreements require unanimous consent to permit sale of substantially all collateral.

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[40] G. NELSON & D. WHITMAN, 1 REAL ESTATE FINANCE LAW § 7.14 at 589 n.1 (3rd Ed. 1993).

Where the bank syndicate is large or the bonds widely held, it may be difficult if not impossible to get unanimous consent. Thus, where the collateral is worth less than the debt, a small minority of bonds or banks can preclude the sale o collateral free and clear.

Take easements and other non-monetary encumbrances on title. In a state court proceeding, the mortgagee can foreclose and take property free and clear so long as the mortgage is prior to the easement or encumbrance – but the holder of the easement or encumbrance is never compelled to take a monetary satisfaction.[41] In this context, therefore, Section 363(f) is unavoidably inferior to state court foreclosure.

Likewise, a mortgagee can foreclose out a tenant whose recorded lease is junior to the mortgage. Unless the tenant's interest is in bona fide dispute[42], the mortgagee cannot use section 363(f) to sell free and clear – again, because the foreclosure does not compel the tenant to accept a monetary satisfaction for its possessory interest.[43] State law wins again.

(There is also a line of cases debating whether a tenant's right to remain in possession under Section 365(h) trumps the ability to sell free and clear under Section 363(f). Many of these cases seem misdirected. For example, the Seventh Circuit in *Precision Industries, Inc. v. Qualitech Steel SBQ LLC* ruled against the tenant because its lease had not been rejected and thus Section 365(h) did not apply – but in fact, the tenant had failed to record its lease and Indiana law gave the landlord the ability to sell free and

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[41] Gouveia v. Tabir, 37 F.3rd 295, 299 (7th Cir. 1994) (covenant requiring residential use of property); Baylake Bank v. TCGC LLC, 2008 U.S. Dist. LEXIS 77192 (E.D. Wisc. 2008).
[42] *In re* Downtown Athletic Club of New York City, 2000 U.S. Dist. LEXIS 7917 at *10-11 (S.D.N.Y. June 9, 2000)
[43] *In re* Bedford Square Assocs., L.P., 247 Bankr. 140, *appeal dismissed as moot*, 259 Bankr. 831, 838 (E.D.Pa. 2001).

clear of an unrecorded lease,[44] so in theory the landlord could have ***assumed*** the lease and still sold the property free and clear. A contrary ruling for the tenant, holding that the right to remain in possession under section 365(h) trumps the ability to sell free and clear under section 363(f), would have been appropriate only if the tenant had recorded its lease such that the mortgagee could not have sold free and clear of the lease irrespective of 365(h).[45])

In theory, the debtor and the first mortgagee could use Section 363(f)(4) to sell property free and clear of all junior liens if those junior liens are "in bona fide dispute":

> A 'bona fide dispute' exists under Section 363(f)(4) when there is an objective basis for either factual or legal dispute as to validity of an interest in property.[46]

Section 363(f)(4) has traditionally been used to eliminate "hold-ups" by allowing the debtor or trustee to take advantage of a beneficial purchase price without litigating with every party claiming an interest in collateral.[47] Where the asserted interest in property was voidable, the debtor did not need to commence an adversary proceeding

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[44] Precision Industries, Inc. v. Qualitech Steel SBQ, LLC, 2001 U.S. Dist. LEXIS 8328 (S.D. Ind., April 24, 2001) at *32 – 35, *rev'd*, 327 F.3rd 537 (7th Cir. 2003).
[45] *In re* Haskell L.P., 321 Bankr. 1 (Bankr. D. Mass. 2005).
[46] *In re* Downour, 2007 Bankr. LEXIS 1102, 2007 WL 963258 at *1 (Bankr. N.D. Ohio March 28, 2007) (Two parcels with same address; mortgagee whose legal description referred to one of the parcels claimed lien on both; second parcel sold free and clear of lien as in bona fide dispute.).
[47] Union Planters Bank N.A. v. Burns (*In re* Gaylord Grain L.L.C.), 306 Bankr. 624, 627 (Bankr. 8th Cir. 2004) (bank asserting UCC lien on farm vehicles without notation on certificate of title); *In re* Downour, 2007 Bankr. LEXIS 1102, 2007 WL 963258 (Bankr. N.D. Ohio March 28, 2007). *Cf. In re* DeCelis, 349 Bankr. 465, 474 (Bankr. E.D. Va. 2006) (adversary proceeding was pending when property was sold under § 363(f)(4); *In re* Balco Equities, Ltd., 323 Bankr. 85, 91(Bankr. S.D.N.Y. 2005) (same)

for the interest to be the subject of a "bona fide dispute" – the fact that an adversary proceeding ***could be commenced*** was sufficient.[48]

That, at least, was the law until 2008, when Bankruptcy Judge Kevin Gross in Delaware held in *Whitehall Jewelers* that a debtor could not sell allegedly consigned property free and clear of objecting consignors under Section 363(f)(4).[49]

Judge Gross refused to approve the sale on two grounds. First, because the dispute was between the debtor and consignors, the dispute did not involve an interest in property of the estate – it questioned whether the property was property of the estate at all, and therefore whether the property could be sold at all under Section 363(b). Judge Gross held that the debtor had to establish that the property it sought to sell was in fact property of the estate. This holding was not novel and has considerable merit: if a public garage files for bankruptcy, we would not want the debtor using Section 363(b) or (c) to sell any of the cars in the garage.

Unfortunately, the Judge Gross went further:

> Moreover, the Court cannot determine whether the Consigned Goods are property of the estate through a contested matter, such as a sale motion under Section 363. Federal Rule of Bankruptcy Procedure 7001(2) requires that an adversary proceeding be commenced to "determine the validity, priority, or extent of [an] interest in property." A recent case in our Circuit dictates that a lien can only be invalidated by an adversary proceeding commenced pursuant to Rule 7001(2), and not by motion. SLW Capital, LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin), 530 F.3d 230, 2008 WL 2498048 (3d Cir. 2008) at *1. In *SLW Capital*, a Chapter 13 debtor included a provision in her confirmed plan which invalidated a mortgage assignee's claim for a secured interest. The Third Circuit held that lien invalidation can occur only through litigation in an adversary proceeding which provides greater

[48] Union Planters Bank N.A. v. Burns (*In re* Gaylord Grain L.L.C.), 306 Bankr. 624, 627 (Bankr. 8th Cir. 2004); *In re* Downour, 2007 Bankr. LEXIS 1102 *2 to*5 (Bankr. N.D. Ohio March 28, 2007).

[49] *In re* Whitehall Jewelers Holdings, Inc., 2008 Bankr. LEXIS 2120 (Bankr. D. Del. July 28, 2008)

procedural protection and, therefore "the adversary proceeding Rule at issue here is mandatory and establishes a right to specific process that must be afforded. Its mandatory nature is grounded in principles of due process that trump 'finality.'" 530 F.3d 230, [WL] at *6.

Prior to *SLW Capital*, courts had routinely disregarded Rule 7001(2) in matters similar to the one at issue. *See* In re Collins, 180 B.R. 447, 452, n.8 (Bankr. E.D. Va. 1995) (citing In re Oneida Lake Dev., Inc., 114 B.R. 352, 358 (Bankr. N.D.N.Y. 1990) (stating that § 363(f)(4) is satisfied even though the debtor has not filed an adversary proceeding seeking to avoid the creditor's lien)); In re Bedford Square Assocs., L.P., 247 B.R. 140, 145 (Bankr. E.D. Penn. 2000) (stating that although the debtor has not commenced a § 544(a)(3) action, the fact that in all probability it could do so successfully is sufficient to establish that a "*bona fide* dispute" for purposes of § 363(f)(4) exists) (citing In re Collins, 180 B.R. at 452, n.7; In re Octagon Roofing, 123 B.R. 583, 590-592 (Bankr. N.D. 1991); In re Oneida Lake Dev., Inc., 114 B.R. at 357-58; and In re Millerburg, 61 B.R 125, 127-128 (Bankr. E.D.N.C. 1986)). However, it is clear after SLW Capital that the law in this Circuit requires strict application of Rule 7001(2) in circumstances where, as here, a debtor seeks to invalidate a creditor's interest.

Accordingly, the Debtors have not met their burden of establishing that the Consigned Goods are property of the estate under Section 363(b) and therefore are not permitted to sell the goods under Section 363(f)(4). The Debtors have also utilized the wrong procedural tool, i.e., a contested matter.

The Court recognizes the burden this decision places upon Debtors to initiate over 120 adversary proceedings, particularly given the short time available before the sale. Nonetheless, the law is clearly established that adversary proceedings are mandated and each Consignment Vendor is entitled to the protections of the law.[50]

Whitehall Jewelers' second holding reads Section 363(f)(4) out of the statute – no interest will ever be "in dispute" at the time of the sale if adjudication of its validity by adversary proceeding is required before the sale can close.

Whitehall Jewelers' second holding is also unfortunate. It gives each party asserting an interest in property the ability to hold up a sale by insisting on the adjudication of its interest by adversary proceeding before the property can be sold under

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[50] Id at *15-18.

Section 363(f)(4). The adversary proceeding may well take more time than the standard state law foreclosure process.

VI. Why Use Section 363?

There used to be two reasons for a mortgagee to negotiate a sale through bankruptcy court as opposed to foreclosing in state court.

First, speed: the traditional justification of a sale in bankruptcy court was speed – it could be done fast in bankruptcy court. In theory, a section 363 sale can be done on 20 days' notice; even allowing time for the formation of a creditors' committee or the filing of schedules of claims for more widespread notice, a section 363 sale can be done in 90 to 120 days.

For New Yorkers, this is a no-brainer -- our real estate foreclosure process is the slowest in the country. I refer to http://www.foreclosureu.com/pdf/statelaws.pdf, a web site that summarizes for each state:

- the average time necessary to foreclose (in court or, where permitted, by power-of-sale),
- the notice-of-sale period and
- the redemption period, if any.

According to this web-site, the average New York foreclosure takes 445 days. In my experience this is optimistic. I practiced at a real estate firm during the real estate collapse of the 1990s, and we told clients to allot three years for a contested foreclosure. Section 363 sales look far quicker.

By contrast, the web site reports Texas as holding the speed record: 27 days for rarely used judicial foreclosures, with sales scheduled on the first Tuesday of every month. Non-judicial foreclosures are even faster: typically, notice of default with 21 days to pay (25 days if a federal tax lien was filed more than 30 days before the proposed sale date), followed by a first-Tuesday auction.

State court foreclosure provides the buyer with title free and clear of junior liens. It also provides the cash buyer with certainty: with one exception, the buyer at a foreclosure sale obtains clean and irreversible title.

The one exception is the equity of redemption that some states grant a defaulting borrower and also, in some instances, junior lienors.

New York's one saving grace, if I may call it that, is the lack of any redemption period. Once the foreclosure process is complete, the mortgagee (or its buyer) owns the property, free and clear of liens.

A sale under Section 363(f) is potentially better for the mortgagee in a state where the mortgagor holds an equity of redemption. Though the property cannot be sold free and clear of the mortgagor's redemption right under Section 363(f), the redemption right itself can be sold as separate property under Section 363(f).[51] The mortgagor (or its purchaser) can thus buy both property and redemption right, eliminating the period of unreliable title.

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[51] *In re* Rigden, 795 F.2d 727 (9th Cir. 1985).

The other reason for liquidating property in bankruptcy, as opposed to state foreclosure proceedings, was tax driven: Section 1146(a) provides that:

> The issuance, transfer or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

Until 2008, a mortgagee could agree with a mortgagor on a sale of realty under section 363 and the buyer could avoid paying transfer tax (and recording tax on any mortgage used to finance the purchase) so long as the transfer was a step towards a chapter 11 plan. The buyer would presumably pay more for the property if it did not have to pay transfer and recording taxes. In 2008, the Supreme Court put a stop to this game in *Piccadilly Cafeterias*:

> Section 1146(a) affords a stamp-tax exemption only to transfers made pursuant to a Chapter 11 plan that has been confirmed. Because Piccadilly transferred its assets before its Chapter 11 plan was confirmed by the Bankruptcy Court, it may not rely on § 1146(a) to avoid Florida's stamp taxes.[52]

Thus a mortgagee who wants to transfer property without paying transfer taxes must negotiate not only a relatively quick section 363 sale, but also a plan of reorganization – a much slower process with much greater hurdles, such as funding full payment of all priority claims and administrative expenses.

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[52] Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.,___ U.S., ___, 128 S. Ct. 2836, 2839 (2008)

VI. Conclusion

Congress will shortly consider revisions to the Bankruptcy Code; its principal focus, legitimately, will be on consumer issues such as the restructuring of home mortgages in chapter 13.

While the statute moves through the House and the Senate, both should give a thought to fixing Section 363. Otherwise, when it comes to liquidating collateral in bankruptcy, recent decisions threaten to make the bankruptcy process irrelevant.

The system isn't working.