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Missing the Forest for the Trees in § 363: How the Ninth Circuit's Bankruptcy Appellate Panel Neglected the Big Picture in the *Clear Channel* Decision

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Section 363 of the Bankruptcy Code is one of its more useful provisions and has been seeing increased use during difficult economic times. One of § 363's important features is the ability to sell free and clear of all liens and interests pursuant to § 363(f). Thus, a successful purchaser in a § 363 sale can take clean title of the property purchased and with the comfort of a reassuring order from a federal judge affirming the legality and effectiveness of the sale. Section 363 also provides assurance that, if the sale is subsequently overturned on appeal, the purchaser will retain ownership of the property.

The Ninth Circuit Bankruptcy Appellate Panel's curious decision in *Clear Channel v. Knupfer (In re PW, LLC)*, [FN1] questioning whether a senior secured lender may credit bid its interest and take free and clear of a nonconsenting junior lien, unnecessarily calls into question some of these basic understandings regarding disposition of estate assets. Although numerous aspects of the decision are defensible, the overall effect of the opinion adds uncertainty into an area where little had existed previously and where the predictability of outcomes can assist in maximizing the value of estate assets.

In light of the decision, parties selling or purchasing assets from a bankruptcy estate pursuant to § 363 should make a strong record at the bankruptcy court level that there is a legal and factual basis for selling assets free and clear of liens. Such a basis should include applicable provisions of nonbankruptcy law that provide that lienholders could be compelled to accept a money satisfaction of their interest for less than the full amount of the liens.

Congress should amend § 363(m) to provide broader protections to good faith purchasers of estate assets. Rather than the current language that merely protects the validity of the sale, Congress should expand the scope of the protections to incorporate the terms of the sale.

The Decision

The salient facts of the *Clear Channel* decision are straightforward: The Chapter 11 trustee of a debtor that owned a piece of real estate sought to sell the property to the senior secured lender. The senior secured lender's interest was worth more than the value of the property. Therefore, the senior lender credit-bid its interest. [FN2] The bankruptcy court entered an order confirming the sale over the objection of a junior lienholder. [FN3] The sale closed 15 days later and the junior lienholder appealed to the Bankruptcy Appellate Panel (the BAP). The BAP reversed and remanded. As explained in more detail below, the BAP realized that it could not overturn the sale itself

but instead reattached the junior lienholder's lien.

There are at least two independent bases on which to question the reasoning of the *Clear Channel* decision: First, the BAP determined that the appeal was not moot. Second, the BAP decided that the bankruptcy court erred in stripping the junior lien pursuant to § 363(f) of the Bankruptcy Code.

Mootness

There were at least three potential mootness grounds that could have resolved the appeal in favor of the senior lender. First, the BAP could have ruled that it could not fashion a remedy and therefore the appeal was constitutionally moot. Second, the BAP could have ruled that parties changing their positions in reliance upon the bankruptcy court's order rendered the appeal equitably moot. Third, the BAP could have ruled that § 363(m) prevented the BAP from overturning the sale on appeal. Of course, the BAP ultimately determined that the appeal was not moot on any of these grounds.

The BAP was probably correct that the appeal was not constitutionally moot. Constitutional mootness derives from the requirement in Article III that an actual case or controversy exist before federal courts adjudicate. In other words, a court must be able to fashion some relief before the court can reverse the decision on appeal. In *Clear Channel*, the BAP decided that the case was not constitutionally moot because the "sale under both § 363(b) and § 363(f) may be reversed in full, or the sale itself under § 363(b) could be preserved while stripping liens under § 363(f) could be reversed." [FN4] Then, as if to foreshadow the effect of the decision, the BAP observed "[s]uch relief might be difficult or inequitable, but it is not impossible." [FN5] In other words, because the BAP could fashion a remedy--even if that remedy were inequitable--the appeal was not constitutionally moot. On this point the BAP appears to be correct.

The doctrine of equitable mootness, however, requires the appellate court to determine "'the consequences of the remedy and the number of third parties who have changed their position in reliance on the order that is being appealed."' [FN6] The BAP acknowledged that much had changed since the bankruptcy court had approved the sale: The senior lender had obtained title to the property, had assumed relevant executory contracts, and had executed a number of documents necessary to effectuate the sale. [FN7] Third parties also had relied upon the sale order in their involvement with the senior lender. [FN8] Having acknowledged the foregoing, the BAP ruled that, although overturning the sale pursuant to § 363(b) might be inequitable, overturning the lien stripping pursuant to § 363(f) would not be. [FN9]

The BAP's reasoning that its reversal is not barred by § 363(m) is based upon the same curious reasoning as the BAP's ruling on equitable mootness. Section 363(m) states that the reversal or modification on appeal of a sale under § 363 does not affect the validity of the sale unless the sale were stayed pending the appeal. Faced with the clear language of the statute that prevents the overturning of a § 363 sale, the BAP then eviscerated at least one presumed purpose of the statute (i.e., assuring certainty that a successful purchaser will be able to keep the property) by ruling that, although the BAP could not overturn the sale, the BAP could unstrip the lien. [FN10] Thus, the senior lender would end up owning the property subject to the junior lien.

The BAP's insensitivity to the senior lender's predicament is stunning given the experience and reputation of the BAP. [FN11] The opinion suggests that the senior lender assumed the risk of having the lien-stripping aspect of the sale overturned on appeal: "[The senior lender] knew or should have known all along that lien-stripping might not work." [FN12] At some level this is correct. It certainly was possible that the bankruptcy court could have declined to strip the lien. Then the secured lender presumably would have sought relief from stay to proceed to foreclosure under state law. However, once the sale was approved and closed, the senior lender had little reason to expect that the lien would be reinstated on appeal 12 months later. If the BAP thought that reinstating a lien under these circumstances was a common occurrence, citations providing examples of similar cases would have been appropriate. This

is the sort of result that is so rare and unexpected that there appears to be no decisional authority supporting it.

§ 363(f)(5)

The yet-more-troubling portion of the BAP's decision, however, is the holding undermining bankruptcy courts' ability to strip liens of undersecured creditors. Section 363(f) provides five circumstances in which the court can sell property free and clear of liens and interests. The most relevant for these purposes is § 363(f)(5), which provides that liens can be stripped if the lienholder "could be compelled in a legal or equitable proceeding to accept a money satisfaction of such interest." [FN13] Certainly, § 363(f)(5) is not a model for statutory construction. At a minimum, one might wonder in what situations a lienholder could refuse to accept a money satisfaction of such an interest.

In fact, both the bankruptcy court and BAP considered that very question. As the BAP explained, "[t]he bankruptcy court reasoned that there was no need to prove the existence or possibility of a qualifying legal or equitable proceeding when the interest at issue was a lien because all liens, by definition, are capable of being satisfied by money." [FN14] Thus, one might conclude that, because "all liens are capable of being satisfied by money," § 363(f)(5) specifically permits selling property free and clear of undersecured junior liens. [FN15]

The BAP, however, rejected this approach. Even after acknowledging that a lien is an interest that is capable of money satisfaction, the BAP ignored a very straightforward basis on which to conclude that the bankruptcy court could strip the lien. Rather than interpreting the words "compelled... to accept a money satisfaction" as they read in § 363(f)(5), the BAP instead interpreted them to say "compelled to accept a money satisfaction *in an amount that is less than full amount secured by* such interest." The BAP phrased this determination as mere skepticism that the lien could be satisfied by "*any* sum, however large or small" and "assume[s] that paragraph (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" even though the language of the statute does not itself require that the sum be less that the value of the interest. [FN16]

The BAP leaves no doubt that it believes that the best reading of § 363(f) requires that no part of the section be superfluous. [FN17] The BAP also makes entirely clear that § 363(f)(3), which permits sales free and clear of liens when the aggregate value of the liens is less than the sales price, does not apply where the sales price is less than the aggregate amount of the liens. If we are to assume that Congress wrote § 363(f) in a manner to avoid surplusage--and the BAP certainly seems to think we should--then § 363(f)(5) applies *only* in circumstances where the sale price is *less* than the aggregate amount of competing interests in the property.

Why then, does the BAP insist that the hypothetical proceeding that § 363(f)(5) contemplates be able to satisfy an interest for less than the value of such interest? The BAP assumes that, because the sale price of the property in question happens to be less than the aggregate value of the competing secured interests, in order for a hypothetical proceeding to satisfy § 363(f)(5), the proceeding must be capable of satisfying the interest through payment of an amount of less than such interest. The BAP simply rejects the notion that § 363(f)(5) means what it says--that it is possible to sell free and clear of any interest in such property if the holder of such interest could be compelled to accept a money satisfaction of the interest. Whether outside a bankruptcy case such money satisfaction must be for the full amount might be immaterial for the purposes of § 363(f)(5). The BAP reviewed and cited cases that came to the opposite conclusion--that the proceeding need not be able to satisfy the liens for less than the amount of the interest--and summarily rejected the reasoning of those cases. [FN18] The opinion simply assumed that, because § 363(f)(5) presumably only applies in instances where the sales proceeds will be less than value of the liens, § 363(f)(5) requires the hypothetical proceeding to be capable of satisfying the liens for less than their full amount. The BAP's explanation on this point is at best cryptic: "Although this view leads to a relatively small role for paragraph (5), we are not effectively writing it out of the Code. Paragraph (5) remains one of five different justifications for selling free and clear of interests, and its scope need not be expansive or all-encompassing. So long as its breadth complements the other four paragraphs consistent with congressional intent, without overlap, our narrow view is justified." [FN19] By this explanation, the BAP seems to be saying that, "[a]s long as there is no surplusage,

whether we read additional words into the statute does not really matter."

The BAP's rejection of the plain language of § 363(f)(5) might be a nothing more than confounding the circumstances in which § 363(f)(5) applies with the state-law criterion that § 363(f)(5) imposes. Bankruptcy practitioners anticipate the possibility that a secured creditor might receive less than the full value of its claim. Thus, it is natural to anticipate that the provision that would permit selling free and clear of an interest might address the respective value of such an interest. Reading the anticipated result of a § 363 sale into a criterion for lien-stripping contained in § 363(f)(5), though, serves no apparent purpose. Simply because we expect that a secured lender will have to accept less than full satisfaction of its secured claim in the bankruptcy case does not mean that we demand the same result in the hypothetical state court proceeding contemplated by § 363(f)(5). It is entirely possible that Congress intended merely to draw a distinction between rights that can be satisfied through payment of money and those that cannot. Thus, if an interest can by satisfied through payment of money under state law, the property to which such interest attaches can be sold free and clear of such interest; if the interest cannot be satisfied through payment, the interest will remain attached to the property.

At least with respect to liens, this reading would be consistent with both the Bankruptcy Code and state law secured transaction principles. Secured creditors looking to the value of the secured property is a fundamental precept of secured transactions. The Bankruptcy Code recognizes that secured credit transactions focus on the value of the property in many ways, not the least of which is the bifurcation of claims into secured and unsecured portions pursuant to § 506(a). [FN20] Similarly, as discussed below, state law typically permits a senior secured creditor to foreclose the secured interest of a junior secured creditor whether in a real estate foreclosure or under Article 9. Thus, whether in or out of a bankruptcy case, the junior secured creditor that is, in bankruptcy parlance "out of the money," should expect to receive nothing from the proceeds of the sale and, within a bankruptcy case, have a general unsecured deficiency claim instead.

Nevertheless, rather than following the actual language of § 363(f)(5), the BAP asked itself the question, "Is there a legal or equitable proceeding in which a lien can be satisfied without full payment?" The BAP then probed its collective thoughts about what sorts of proceedings might fulfill such a requirement. Interestingly, the BAP came up with relatively obscure ideas and ignored the most obvious. The BAP posited that "a buy-out arrangement among partners, in which the... partnership agreement provides for a valuation procedure that yields something less than market value of the interest being bought out[]" might satisfy § 363(f)(5). [FN21] Similarly, a "case in which specific performance might normally be granted, but the presence of a liquidated-damages clause allows a court to satisfy the claim of a nonbreaching party in cash instead of a forced transfer of property." [FN22] Finally, "another might be satisfaction of obligations related to a conveyance of real estate that normally would be specifically performed but for which the parties have agreed to a damage remedy." [FN23]

Remarkably, the BAP does not address the most common and relevant candidate for an applicable proceeding under the circumstances--real estate foreclosure under state law. It is not entirely apparent from the opinion whether the appellee raised state real estate foreclosure proceedings as a possible proceeding in which a lienholder could be forced to accept a money satisfaction of its interest. [FN24] Nevertheless, given that the BAP undertook a comprehensive review of relatively obscure proceedings that might have satisfied the requirements of § 363(f)(5), the BAP should at least have considered and discussed whether a proceeding as common and routine as a state law real estate foreclosure might have done so as well.

In fact, a cursory review of discussions on the topic unsurprisingly suggests that a real estate foreclosure under state law almost certainly would satisfy the criteria of § 363(f)(5)--*even in the BAP's rewritten version discussed above*. As Professor George Kuney notes, "foreclosure sales are commonly recognized hypothetical proceedings that can satisfy § 363(f)(5) []" [FN25] and that judicial foreclosure proceedings "seem to fall directly within the words of the statute." [FN26] The point is so commonly understood as to be axiomatic. As one article explains it, "[p]resumably it is clear that in the context of a foreclosure proceeding, if nothing else, a senior secured creditor can credit bid and eliminate the liens of junior secured creditors." [FN27] Thus, the vexing question whether the hypo-

thetical proceeding that would satisfy § 363(f)(5) must be able to satisfy an interest for less than full value was likely immaterial. There was a proceeding (i.e., a state law real estate foreclosure) that probably would satisfy § 363(f)(5) regardless of which reading the BAP endorsed.

At least within the context of the decision, it is largely a mystery why the BAP ignored the likelihood that a California state court could compel the junior lienholder to accept a money satisfaction of its interest. Even if the BAP believed that judicial foreclosure did not fall within § 363(f)(5), there is no obvious reason why the BAP declined to discuss the issue. The BAP apparently expected the bankruptcy court to make a factual finding regarding what kind of proceeding would satisfy § 363(f)(5). [FN28] There is also an oblique reference to the failure of the bankruptcy court and parties to cite any such proceedings under nonbankruptcy law. [FN29] Again, though, because of the BAP's silence on the matter, we are left to guess whether the BAP believed there was a factual issue or some other impediment to taking judicial notice of California real estate laws and deeming that a foreclosure proceeding would satisfy § 363(f)(5).

Ultimately, to everyone's benefit, the BAP was very clear on the following point: Cramdown pursuant to § 1129(b) does not satisfy § 363(f)(5). The bankruptcy court and the appellees had cited cases holding that § 1129(b) qualified as a legal or equitable proceeding for the purposes of § 363(f)(5). [FN30] The BAP rejected this argument entirely and held that "Congress did not intend under § 363(f)(5) that nonconsensual confirmation be a type of legal or equitable proceeding to which that paragraph refers." [FN31] Therefore, it is less likely that litigants or bankruptcy courts will cite to § 1129(b) as a legal or equitable proceeding that would satisfy § 363(f)(5) and more likely that they will look to applicable nonbankruptcy law.

Further criticisms and implications

The fairest criticism of the *Clear Channel* decision is perhaps that it seems to lack practical sense and predictability. [FN32] The factual scenario, property being sold to the senior secured lender over the objection of the junior secured lender who expects receive nothing from its secured claim, is quite common in bankruptcy cases. Under these circumstances, whether the property is being transferred as part of a foreclosure process or a § 363 sale, one would expect the sale to occur and the junior creditor to receive nothing from the sale unless the value of the property were sufficient to pay the senior lender in full. Further, once the sale had closed, having the transaction disturbed on appeal seems particularly unusual. A junior creditor seeking to overturn such a sale generally must obtain a stay pending appeal to prevent equitable mootness from insulating the sale. [FN33] Thus, the senior secured creditor generally obtains the property with a court order and free of any junior liens. With the appellant perhaps having to post a bond to obtain a stay pending appeal, the chances of having the sale disturbed after closing should be remote.

The *Clear Chanel* decision, however, comes to the opposite result from what one would expect. Rather than insisting that the junior lender obtain a stay pending appeal, the BAP suggested that the senior lender "knew or should have known all along that lien-stripping might not work." [FN34] Rather than having the sale left unaffected and/or affirmed on appeal, the BAP reversed and made the sale subject to the junior lender's lien. Simply put, experienced bankruptcy practitioners would have expected exactly the opposite result. Not surprisingly, the *Clear Channel* opinion does not cite any cases that resulted in a similar disposition.

Lest we dismiss the kind of harm that opinions such as the *Clear Channel* decision can engender, consider a hypothetical piece of property being sold pursuant to § 363. Maximizing the value of estate assets is usually considered one of the goals inherent in a bankruptcy case. [FN35] Under these circumstances however, the senior secured lender must decide whether to: (a) participate and credit-bid; (b) have the property sold to a potential third party; or (c) move for relief from stay. All other things being equal, the lender might be interested in credit bidding for the property. After all, ideally the senior secured lender would exit the transaction with either: (a) title to the property blessed by an order from a bankruptcy judge saying that the senior lender has title free and clear of all liens; or (b) proceeds from the sale to a third party sufficient to cover the amount of the senior lienholder's debt. After *Clear*

Channel, however, there is an appellate decision authored by highly respected judges that questions whether a senior secured lender or third-party purchaser can acquire the asset free and clear of junior liens. With the possibility of a court departing from standard practice, the calculations become completely different.

Moreover, a potential purchaser of the same property has a similar disincentive to bid for the asset. [FN36] Again, a successful purchaser of an estate asset ordinarily would expect to acquire the property free and clear of all liens and with an order from a bankruptcy judge conveying title. The possibility of either: (a) being able to acquire the asset but the bankruptcy court refusing to strip the liens; or worse, (b) acquiring the asset and later having an appellate court reattach a junior lien, should be sufficient to give any potential purchaser pause. There can be little doubt that discouraging potential purchasers of estate assets is to the detriment of bankruptcy estates and the maximization of estate assets.

In the face of such disconcerting jurisprudence, one wonders whether there is something else at play in the *Clear Channel* decision. At least one commenter has surmised that the opinion "seems motivated by concerns that § 363 has come to be abused and is often deployed to circumvent the confirmation process to the detriment of third-party rights." [FN37] Although there is certainly an undercurrent in scholarly work questioning whether sales pursuant to § 363 undermine some of the goals and protections inherent in Chapter 11, [FN38] the opinion itself does not give many such indications. [FN39] If the reasoning behind the *Clear Channel* decision really were an attempt to curb the proliferation of § 363 and encourage more use of Chapter 11 plans, the facts of the case make it a particularly poor candidate from which to make an example. Although the sale in *Clear Channel* was for substantially all of the assets of the estate, the debtor owner essentially sold a single piece of real estate. As noted above, outside of a bankruptcy case, the parties expected that the senior secured lender would be able to foreclose the junior lender's interest in any event. Whatever the value that a plan of reorganization might bring beyond a § 363 sale to a typical case, such value is highly unlikely to be present under the circumstances present in *Clear Channel*. Therefore, concerns about § 363 sales increasing prevalence in Chapter 11 cases does not appear to be a substantial factor in the decision.

It is perhaps more likely that the *Clear Channel* decision is a modest instance of bad facts making bad law. The junior lienholder was in a position that could generate some sympathy from a neutral observer. The trustee had moved for a quick sale to the senior lender after a short period of marketing for a price that almost certainly would wipe out junior interests. The junior lienholder was in the unenviable position of arguing to the bankruptcy court that it should delay the proposed sale in the hopes that further marketing and discussions with the property's neighbors would yield a better sale price. Obviously, that argument failed. Then, the sale order contained no finding as to: (a) the value of the property; or (b) a basis to strip the junior liens through a nonbankruptcy proceeding. [FN40] Facing a junior lienholder that received no proceeds from a quick asset sale and no findings that would support lien stripping, the BAP might have been sympathetic to the plight of the junior lienholder. [FN41]

It is also possible that the BAP was particularly dissatisfied with the record on appeal. As noted above, the BAP made a couple references to the lack of a finding by the bankruptcy court of the specific nonbankruptcy mechanism that would satisfy § 363(f)(5). [FN42] The appellees apparently relied upon the bankruptcy court's references to § 1129(b), and thus the BAP did not have extensive briefing on state foreclosure laws. Had there been a record below that established that state foreclosure laws satisfy § 363(f)(5), the entire *Clear Channel* decision might read very differently. Nevertheless, if the decision really were about the record on appeal, a straight remand with instructions might have been a better choice for the BAP. Such a remand seems less likely to add a layer of uncertainty to bankruptcy asset sales than a dense, 22-page opinion from a respected BAP.

To add yet more irony, shortly after the *Clear Channel* opinion was published, the parties settled the case and the BAP's decision was not vacated. Thus, there was no opportunity on remand for the bankruptcy court to make the sort of findings that might allay the concerns of the BAP. If, for example, the bankruptcy court had held that state foreclosure laws would have required the junior lender to accept a money satisfaction of its interest, would anyone have expected that the BAP would have reversed that decision? [FN43] Because of the settlement, however, the

bankruptcy court did not have a chance to do so. As such, any potentially clarifying points that the bankruptcy court could have added to mitigate the confusion arising from the BAP's decision are simply left to academic speculation.

That, at least as of this writing, there are no other reported decisions following *Clear Channel* should provide little comfort to prospective purchasers of assets from bankruptcy estates. Given that the *Clear Channel* decision came with little warning, no one knows when the next bankruptcy or appellate court will suddenly question what sort of proceeding might be available to extinguish a junior creditor's secured interest. It is impossible to predict who will be the next unsuspecting prospective credit bidder to have the validity of its interest in purchased assets called into question.

On a micro level, it would be wise for any seller or purchaser of estate assets seeking to transfer assets free and clear of liens to make a better record at the bankruptcy court level than occurred in *Clear Channel*. Such a record should include the basis for findings about the value of the property and the legal theory allowing the bankruptcy court to strip liens. Assuming that other courts might be inclined to follow the BAP's reasoning, the ability to cram down a plan pursuant to § 1129(b) should not form the basis for lien stripping. It is certainly better to cite state real estate foreclosure laws and Article 9 as the type of proceedings that might satisfy § 363(f)(5) than to rely upon § 1129(b).

On a macro level, the best manner in which to avoid a decision like *Clear Channel* would be to expand the protections of § 363(m) to the terms of the sale. [FN44] As explained above, the BAP recognized that it was powerless to overturn the sale itself. The BAP read the provisions of § 363(m) to apply only to the validity of the sale, not to the terms of the sale. That interpretation appears correct from a textual perspective but undermines the promotion of finality that § 363(m) embodies. Preventing appellate courts from being able to reattach liens or otherwise disturb the terms of such sales would reduce the concerns of successful purchasers in bankruptcy sales that the sale might ultimately be disturbed on appeal.

Research References: Norton Bankr. L. & Prac. 3d §§ 44:22

West's Key Number Digest, Bankruptcy  3073

[FN1]. *Clear Channel v. Knupfer (In re PW, LLC)*, 391 B.R. 25 (B.A.P. 9th Cir. 2008).

[FN2]. Section 363(k) provides for credit bidding:

> 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).

[FN3]. The junior lienholder objected largely on the ground that the sale procedures did not provide sufficient time for proper marketing of the property or for potential purchasers to investigate the assets sufficiently. The objection as filed with the bankruptcy court did not contest the court's ability to strip its lien.

[FN4]. *Clear Channel*, 391 B.R. at 33.

[FN5]. *Clear Channel*, 391 B.R. at 33.

[FN6]. *Clear Channel*, 391 B.R. at 33 (quoting *Darby v. Zimmerman (In re Popp)*, 323 B.R. 260, 271 (B.A.P. 9th Cir. 2005)).

[FN7]. *Clear Channel*, 391 B.R. at 33.

[FN8]. *Clear Channel*, 391 B.R. at 34.

[FN9]. *Clear Channel*, 391 B.R. at 34.

[FN10]. At least one commentator has noted how patently unfair this result is. "[V]irtually no buyer (especially not a senior credit-bidder that is buying assets as a last resort alternative to receiving a significantly discounted payout) would purchase assets out of bankruptcy, certainly not at the highest price, if junior liens potentially remained on the assets." Joel H. Levitin, Stephen J. Gordon & Richard A. Stieglitz, *Ninth Circuit BAP Dresses Down Lienstripping*, 27-Oct. Am. Bankr. Inst. J. 1, 53 (2002).

[FN11]. The three judges on the panel, Bruce Markell, Frank Kurtz and Jim Pappas "are highly regarded and well-known." Robert M. Lawless, *BAP Prohibits Sale of Free and Clear of an Underwater Junior Lien,* 28 No. 10 Bankr. L. Ltr. 1 (Oct. 2008).

[FN12]. *Clear Channel*, 391 B.R. at 37.

[FN13]. 11 U.S.C. § 363(f)(5).

[FN14]. *Clear Channel*, 391 B.R. at 45 (footnote omitted).

[FN15]. Another argument raised below and that served as a bit of a distraction on appeal is whether the cramdown provisions of § 1129(b) could serve as a proceeding that would qualify under § 363(f)(5).

[FN16]. *Clear Channel,* 391 B.R. 42.

[FN17]. "[The] *Clear Channel* [decision] is a testament to how deep the norm is against reading surplusage into statutes." Robert M. Lawless, *BAP Prohibits Sale of Free and Clear of an Underwater Junior Lien,* 28 No. 10 Bankr. L. Ltr. 1 (October 2008). This canon of judicial construction is beyond the scope of this article. Nevertheless, it is not obvious why the BAP believes that each subsection of § 363(f) should be mutually exclusive. It is possible that Congress meant § 363(f) to be fairly broad and that a single interest might be able to fit within more than one subsection of § 363(f).

[FN18]. *Clear Channel*, 391 B.R. at 43.

[FN19]. *Clear Channel*, 391 B.R. at 43.

[FN20]. Section 506(a)(1) provides as follows:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under § 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a)(1).

[FN21]. *Clear Channel*, 391 B.R. at 43.

[FN22]. *Clear Channel*, 391 B.R. at 43 (citing *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 781 N.E.2d 1114 (1st Dist. 2002)).

[FN23]. *Clear Channel*, 391 B.R. at 43 (citing *S. Motor Co. v. Carter-Pritchett-Hodges, Inc.* (*In re MMH Automotive Group, LLC*), 385 B.R. 347 (Bankr. S.D. Fla. 2008)).

[FN24]. A review of oral argument reveals that the BAP did not ask whether any such proceeding existed and thus the parties never suggested a state law foreclosure proceeding. At least before the bankruptcy court, however, the parties seem to have agreed that state foreclosure proceedings would result in the junior lienholder's interest being extinguished. The junior lender noted in an objection to the sale procedures motion that it expected to have its interest "wiped out" by the credit bid. (Clear Channel's Opposition to the Trustee's Motion for an Order Establishing Procedures for the Sale of Substantially All the Assets of the Estate, Approving Binding Term Sheet Between the Trustee and DB Burbank, LLC, and Approving and Ratifying the Trustee's Execution Thereof, Case No. 06-16059 BB, Docket No. 97, at 3.) The senior lender similarly noted in a reply that the junior lienholder would have its interest extinguished in a state foreclosure proceeding. (Reply of DB Burbank LLC to (1) Clear Channel's Opposition to the Trustee's Motion for an Order Establishing Procedures for the Sale of Substantially All the Assets of the Estate, Approving Binding Term Sheet Between the Trustee and DB Burbank, LLC, and Approving and Ratifying the Trustee's Execution Thereof, and (2) Joinder of Debtor to Clear Channel's Opposition [Etc.], Case No. 06-16059 BB, Docket No. 99, at 6.)

[FN25]. George W. Kuney, *Misinterpreting Bankruptcy Code § 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235, 251-52 (2002) (hereinafter "*Misinterpreting Bankruptcy Code § 363(f)*"). Kuney further notes that a nonjudicial foreclosure under a deed of trust might not fall within the ambit of a "legal or equitable proceeding" pursuant to § 365(f)(5). Nevertheless, in California the creditor may bring either a judicial or nonjudicial foreclosure and as such the question whether a nonjudicial foreclosure satisfies § 363(f)(5) has little bearing on whether real property can be sold free and clear pursuant to § 363(f)(5).

[FN26]. *Misinterpreting Bankruptcy Code § 363(f)*, 76 Am. Bankr. L.J. at 252 n.64.

[FN27]. Joel H. Levitin, Stephen J. Gordon & Richard A. Stieglitz, *Ninth Circuit BAP Dresses Down Lienstripping*, 27-Oct. Am. Bankr. Inst. J. 1 (2008).

[FN28]. "We follow this reasoning and hold that 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.'" *Clear Channel*, 391 B.R. at 45 (citing *Scherer v. Federal Nat'l Mortgage Ass'n* (*In re Terrace Chalet Apartments, Ltd.*), 159 B.R. 821, 829-30 (N.D. Ill. 1993)).

[FN29]. The BAP noted that neither of the appellees had directed the BAP "to any such proceeding under nonbankruptcy law, and the bankruptcy court made no such finding." *Clear Channel*, 391 B.R. at 46.

[FN30]. *Clear Channel*, 391 B.R. at 46.

[FN31]. *Clear Channel*, 391 B.R. at 46.

[FN32]. The importance of predictability in law is beyond the scope of this article. As one legal commentator explained: "If a result is predictable, settlement is easier: there's little point in continuing to litigate on either side, because additional money spent on lawyers cannot change the result. If a result is predictable, one can more easily conform conduct to be law-abiding. Corporations aren't incentivized to break contracts with one another to see

whether they can get a better deal in the courts; individuals and corporations know where the line is in dealing with the public and won't step over it." http://overlawyered.com/2007/06/the-rule-of-law-why-is-predictability-important/. *See also* *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991) (noting that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual an perceived integrity of the judicial process.").

[FN33]. The BAP makes an ironic observation in the defense of appealing junior lenders. Parties appealing a § 363 sale typically must seek a stay pending appeal: "But in these circumstances, when a bond staying the consummation of the deal would have been far in excess of the lien that [the junior lender] is trying to protect, we question whether that remedy is exclusive." *Clear Channel*, 391 B.R. at 37. One might expect that an appellant with a case that is not strong enough to obtain a stay of appeal on the merits and an insufficient economic stake to post a bond should not expect to prevail on appeal in a case when obtaining a stay pending appeal is generally a prerequisite to success.

[FN34]. *Clear Channel*, 391 B.R. at 37. Compare the attitude of the BAP to that of the Ninth Circuit in *Trone v. Roberts Farms, Inc.* (*In re Roberts Farms, Inc.*), 652 F.2d 793 (9th Cir. 1981) (affirming the dismissal of an appeal on equitable mootness grounds where the appellant had failed to obtain a stay pending appeal).

[FN35]. "Fiduciaries of the bankruptcy estate are duty-bound to maximize the value of assets for the benefit of creditors. This is generally accomplished by "shopping" the assets as widely as possible, and encouraging competitive bidding among as many interested buyers as possible, in order to obtain the "highest and best" price." http://www.turnaround.org/Publications/Articles.aspx?objectID=1386.

[FN36]. Although the *Clear Channel* decision itself addressed only a senior secured lender credit bidding, it is not clear that the holding was limited to those facts.

[FN37]. Robert M. Lawless, *BAP Prohibits Sale of Free and Clear of an Underwater Junior Lien*, 28 No. 10 Bankr. L. Ltr. 1 (2008).

[FN38]. *See, e.g.*, George W. Kuney, *Misinterpreting Bankruptcy Code § 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235 (2002); Elizabeth Warren & Jay Westbrook, *Secured Party in Possession*, 22 Am. Bankr. Inst. J. 12, 52-3 (2003).

[FN39]. To the extent that it might have any bearing, a cursory review of Judge Markell's scholarly work from when he was a professor reveals no obvious examples of concerns about § 363 sales replacing Chapter 11 plans.

[FN40]. *See* Order Granting Trustee's Motion for an Order Establishing Procedures for the Sale of Substantially All the Assets of the Estate Free and Clear of All Liens, Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, Determining the Value of the Assets Sold and Valuing Claims Secured by Such Assets, Authorizing the Payment of Commissions to Trustee's Real Estate Brokers, Waiver of 10-Day Stay, and Related Relief, Case No. 06-16059 BB, Docket No. 156. Ultimately the trustee made a record as to the value of the property after the sale had closed. The lack of an overbidder rendered the senior lienholder the sole participant at the auction. There having been relatively little time to market the assets, one might question whether the process reflected to the true value of the property sold.

[FN41]. Another aspect of the case that is beyond the scope of this article is the extent to which the parties succeeded or failed in making their position seem sympathetic in the record and on appeal. From the standpoint of legal analysis, the senior lender/appellees probably had the better argument but nevertheless lost on appeal. My review of the appellate record was not exhaustive, nevertheless it does not appear that the appellees were able to paint the junior lienholder as a disgruntled out-of-the-money creditor wearing the proverbial "black hat" and trying to disrupt a sale that was successful for all other parties. Whether doing so might have yielded a different result will remain un-

known.

[FN42]. "We follow this reasoning and hold that 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."' *Clear Channel*, 391 B.R. at 45. Also, neither of the appellees had directed the BAP "to any such proceeding under non-bankruptcy law, and the bankruptcy court made no such finding." *Clear Channel*, 391 B.R. at 46.

[FN43]. "[I]t will be quite surprising if the bankruptcy court does not find, on remand, that there is a proceeding that satisfies the lienstripping requirements of § 363(f)(5) and reach the same result it did the first time, and if such finding does not hold up on appeal." Joel H. Levitin, Stephen J. Gordon & Richard A. Stieglitz, *Ninth Circuit BAP Dresses Down Lienstripping*, 27-Oct. Am. Bankr. Inst. J. 1 (2002).

[FN44]. Section 363(m) currently provides as follows:

> 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.

11 U.S.C. § 363(m).

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