REVISITING CLEAR CHANNEL – ACQUIRING REAL PROPERTY IN A SECTION 363 BANKRUPTCY SALE "FREE AND CLEAR" OF LIENS

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INTRODUCTION

Section 363(b)(1) of the Bankruptcy Code[1] gives the bankruptcy debtor or the debtor's trustee[2] authority to sell estate property outside of the ordinary course of business after notice and a hearing. An essential feature of the 363 sale is the ability, pursuant to section 363(f), to sell property free and clear of all liens and interests.[3] The purchaser's confidence in holding unassailable title is reinforced by section 363(m), which provides that even if the sale is subsequently overturned on appeal the purchaser's title will not be affected.[4] These provisions benefit the estate as well as the purchaser, because the assurances given to the purchaser greatly enhance the proceeds realizable from a 363 sale.[5]

These protections were called into question by the Ninth Circuit Bankruptcy Appellate Panel ("BAP") in 2008 in *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*.[6] In *Clear Channel*, the trustee owned real estate and sought to sell it through a 363 sale.[7] The senior secured lender, which held a lien exceeding the market value of the property, purchased the property at the 363 sale by credit bidding its interest.[8] After the sale closed the junior lienholder appealed, seeking reinstatement of its junior lien.[9] Applying section 363(m), the BAP upheld the sale, but only as to bare title.[10] As is explained in more detail below, the BAP held that section 363(m) did not moot an appeal by the junior lienholder, and remanded the issue of whether the junior lien must be reinstated, leaving open the possibility that the senior lender/purchaser's title became encumbered by what was formerly a junior lien, essentially priming the senior lender's priority.[11]

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[1] 11 U.S.C. § 363(b)(1) (2006).

[2] Although section 363 explicitly empowers only the trustee, a debtor in possession in a chapter 11 bankruptcy generally has the same powers as a trustee. *See id.* at § 1107(a). The use of the term "trustee" in this article includes reference to the debtor in possession, where a trustee has not been appointed in a chapter 11 case.

[3] *Id.* § 363(f).

[4] *See id*. at § 363(m).

[5] *See* 2 NORTON BANKR. LAW AND PRAC. § 44:35, at 44-89–93 (William L. Norton, Jr. ed., 3d ed. 2012) (explaining that without protection through section 363(m), potential appeals would create uncertainty and chill bidding on debtor's assets).

[6] 391 B.R. 25 (B.A.P. 9th Cir. 2008).

[7] *Id.* at 32.

[8] *Id.* at 30.

[9] *Id.* at 32.

[10] *See id.* at 47.

[11] *See id.*

The publication of the *Clear Channel* opinion generated a flurry of commentary from the bankruptcy bar, much of it predicting dire consequences for future 363 sales.[12] But what impact has *Clear Channel* actually had on 363 sales? This article presents an in depth analysis of the *Clear Channel* decision and examines the relevant 363 sale cases decided after *Clear Channel* to assess the impact that *Clear Channel* has had on 363 sales.

I. OVERVIEW OF A SECTION 363 SALE.

Unless a debtor is in the business of buying and selling real estate, a sale of real property will be outside of the ordinary course of business and, pursuant to section 363(b), will require notice and a hearing.[13] To comply with section 363(b), the trustee will make a noticed motion to obtain an order from the court authorizing the sale.[14] Before filing its motion, the trustee typically will have identified a prospective purchaser—known as a "stalking horse"—who has entered into a conditional asset purchase agreement for the property.[15] The motion and order will typically specify bidding procedures for an auction that will begin with the floor bid set by the stalking horse bidder.[16] A secured party has the right to credit bid in a section 363 sale subject to the approval of the court, which approval can be withheld "for cause."[17] Once a winning bidder has been selected, the parties will proceed to closing in accordance with terms of the court order.[18]

Perhaps the most significant as well as controversial attribute of the section 363 sale is the statutory provision for lien-stripping—that is, the delivery of "free and clear" title.[19] If the moving trustee establishes that any one of the five requisites codified in sections 363(f)(1)–(f)(5) is met, the court's order will state that the sale

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[12] *See, e.g.*, Joel H. Levitan, Stephen J. Gordon & Richard A. Stieglitz, *Ninth Circuit BAP Dresses Down Lienstripping: Could This Be the Last Dance for Section 363 Sales?*, 27 AM. BANKR. INST. J., Oct. 2008, at 53 ("[C]ompleting a plan process is likely to be significantly more expensive than a § 363 sale process."). *See also* Richard J. Corbi, *Section 363(f) "Free and Clear" Sales May Not Survive Appeal*, 18 NORTON J. BANKR. LAW AND PRAC., 163, 167–68 (Feb. 2009) (predicting that potential buyers will be scared away from bankruptcy sales); Evan Jones & Emily Culler, *BAP Opinion in* Clear Channel *Likely to Chill Credit Bids*, JOINT NEWSLETTER OF THE ABA SECTION OF BUSINESS LAW COMMITTEES ON COMMERCIAL FINANCE AND UNIFORM COMMERCIAL CODE, Fall 2008, 1, 5 (predicting *Clear Channel* decision will decrease buyer's willingness to rely on bankruptcy court orders).

[13] *See* 11 U.S.C. § 363(b)(1) (2006).

[14] At least 21 days' notice of a 363 sale must be provided to the United States Trustee and to all creditors and indenture trustees unless the court orders otherwise. FED. R. BANKR. P. 2002(a)(2) (2006). The notice must "include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections." FED. R. BANKR. P. 2002(c)(1).

[15] *See, e.g., In re* Metaldyne, 409 B.R. 661, 663 (Bankr. S.D.N.Y 2009) (describing "stalking horse" bidder).

[16] *See id.* at 664 (explaining "stalking horse" bidder's role is to provide bidding floor).

[17] 11 U.S.C. § 363(k).

[18] *See* Jason Binford, *Collusion Confusion: Where Do Courts Draw the Lines in Applying Bankruptcy Code Section 363(n)?*, 24 EMORY BANKR. DEV. J. 41, 44 (2008).

[19] *See* 11 U.S.C. § 363(f).

is made "free and clear"[20] of liens or other interests in the property. The purchaser of property sold pursuant to section 363 is protected (under section 363(m)) from the effects of a reversal on appeal of the authorization to sell so long as the purchaser acted in good faith.[21] It is of no consequence that the purchaser was aware of the pendency of the appeal; to prevent this result the party appealing the authorization order must obtain a stay of the sale pending the hearing on its appeal.[22] Paraphrased in relevant part, section 363(m) states that a "reversal or modification on appeal of an authorization . . . of a sale . . . of property does not affect the validity of a sale . . . under such authorization" to a "good faith" purchaser, unless the authorization and sale "were stayed pending appeal."[23]

II. THE *CLEAR CHANNEL* DECISION

The protections afforded the purchaser under a 363 sale were called into question by *Clear Channel*. *Clear Channel* warns a potential purchaser not to rely on a bankruptcy court's free and clear authorization order, notwithstanding the protection ostensibly afforded by section 363(m), where the sale price is less than the aggregate amount of the claims of secured creditors.[24]

In *Clear Channel*, the bankruptcy court authorized the sale of the debtor's property free and clear of liens.[25] The "senior lender"[26] credit-bid for its real estate collateral, and the junior lienholder asserted that its lien could not be stripped, as none of the conditions enumerated in section 363(f) were satisfied.[27] Over the junior lender's objection, the bankruptcy court authorized the sale free and clear of the junior lien.[28] The junior lender appealed, but without obtaining a stay of the sale order pending the appeal.[29] The sale to the senior lender closed before the appeal was heard, with the senior lender purchasing the debtor's property through a credit bid.[30]

On appeal, the trustee and the purchaser argued (1) that the junior lender's appeal was moot under section 363(m) and (2) that even if the appeal was not moot,

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[20] *See id.*

[21] *See id.* at § 363(m).

[22] *See id.* ("[W]hether or not such entity knew of the pendency of the appeal, unless such authorization and such sale . . . were stayed pending appeal.").

[23] *Id.*

[24] *See* Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), 391 B.R. 25, 41 (B.A.P. 9th Cir. 2008) ("[W]e . . . hold that § 363(f)(3) does not authorize the sale free and clear of a lienholder's interest if the price of the estate property is equal to or less than the aggregate amount of all claims held by creditors who hold a lien or security interest in the property being sold.").

[25] *Id.* at 32.

[26] Technically, the "senior lender" was second in priority. Concurrent with the consummation of its purchase, the credit bidding lienholder/purchaser agreed to make a cash payment to the more senior lienholder, presumably paying the more senior lien in full. *See id.*

[27] *See id.*

[28] *Id.*

[29] *Id.*

[30] *See id.* at 30, 32.

the sale was free and clear of the junior lender's lien under section 363(f).[31] Addressing first the mootness issue, the BAP held that section 363(m) barred only reversal of the sale itself, but did not bar a reinstatement of the junior lien.[32] With respect to the junior lien, the BAP held there had been no showing that any of the provisions of 363(f) had been satisfied, and reversed that portion of the bankruptcy court's sale authorization order that directed that the sale be made free and clear of the junior lender's lien.[33]

In the Ninth Circuit and any other jurisdiction not explicitly rejecting *Clear Channel*, a prudent bidder would be well advised to include in its bid a requirement that the closing of its 363 purchase be postponed until after either (1) the time for appeal of the bankruptcy court's sale order has passed, with no appeal filed or (2) a favorable ruling has been issued on such an appeal. Generally, an appeal from a sale authorization order must be made within 10 days after entry of the order.[34] By motion, the bankruptcy judge may extend the time for an appeal by up to 21 additional days.[35] However, as pointed out by several commentators, even if this condition to an offer to purchase was acceptable to the trustee and the court, the attendant uncertainty and delay nonetheless would be likely to have a chilling effect on bidding.[36]

Fortunately for prospective acquirers of property in bankruptcy, *Clear Channel* has limited precedential value[37] and has been subject to considerable criticism, both from commentators and in judicial opinions.[38] Our research has uncovered only one

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[31] *See id.* at 35, 39.

[32] *See id.* at 35.

[33] *Id.* at 47.

[34] *See* 11 U.S.C §§ 8001(a), 8002(a) (2006).

[35] FED. R. BANKR. P. 8002(c)(2) (2006).

[36] *See, e.g.*, Jones & Culler, *supra* note 12 (noting if *Clear Channel* is followed, buyers will no longer have security in market).

[37] In the Ninth Circuit, BAP decisions are not binding on district courts. Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) ("[I]t must be conceded that BAP decisions cannot bind the district courts themselves."). Whether Ninth Circuit BAP decisions are binding even on the bankruptcy courts is problematic, with the Ninth Circuit in *Bank of Maui* refusing to address the issue. *Id.* (stating "[w]e need not and do not decide the authoritative effect of a BAP decision because, for the purposes of Bankruptcy Rule 9011, *its binding effect is so uncertain* that it cannot be the basis for sanctioning a party for seeking a contrary result in a district where the underlying issue has never been resolved.") (emphasis added). Some subsequent decisions say BAP decisions are binding on bankruptcy courts, others say they are not, and still others declare that BAP decisions are binding only on those bankruptcy courts situated in the district out of which the appeal arose. The battle over the stare decisis effects of Ninth Circuit BAP decisions has raged in the courts for decades and shows no signs of abating. *Compare In re* Rinard, 451 B.R. 12, 21 (Bankr. C.D. Cal. 2011) ("BAP decisions are not binding on bankruptcy courts, as district court decisions are not."), *with In re* Roetman, 405 B.R. 336, 339 (Bankr. D. Ariz. 2009) ("This Court agrees . . . that bankruptcy courts generally should follow the circuit's BAP decisions that are 'on point' and not 'meaningfully distinguishable' even when the bankruptcy court disagrees with the BAP's analysis.").

[38] With respect to 363(m) the Sixth Circuit BAP stated that "the overwhelming weight of authority disagrees with [*Clear Channel*'s] holding that the § 363(m) stay does not apply to the 'free and clear' aspect of a sale under § 363(f)" and that "*Clear Channel* appears to be an aberration in well-settled bankruptcy jurisprudence applying § 363(m) to the 'free and clear' aspect of a sale under § 363(f)." *In re* Nashville Senior Living, LLC, 407 B.R. 222, 231 (B.A.P. 6th Cir. 2009), *aff'd In re* Nashville Senior Living, LLC, 620 F.3d 584 (6th Cir. 2010). In a California district court opinion, *In re Namco Capital Group, Inc.*, the court

opinion following *Clear Channel's* mootness holding,[39] with other opinions declining to follow its holding.[40] Moreover, for the reasons discussed below, *Clear Channel* is unlikely to be followed as to mootness in the future. But even if a court were to follow *Clear Channel* on mootness, a senior lender purchasing property encumbered by a junior lien should nonetheless be able to obtain title free and clear of any junior liens, on substantive grounds, by demonstrating the existence of a qualifying non-bankruptcy proceeding satisfying the requirements of section 363(f)(5).

A. Clear Channel*'s Holding on Mootness*

Clear Channel considered three different bases for mootness – constitutional, equitable, and statutory, and rejected all three as inapplicable with respect to the stripping of the junior lien.[41] The first basis, constitutional mootness, arises only when it has become impossible for a court to grant relief.[42] In *Clear Channel* the court could have reversed the sale and/or stripped the lien, so from the perspective of constitutional mootness the case was not moot.[43] Equitable mootness does not require impossibility but instead arises when reversal of the bankruptcy sale order would be unfair to parties who took actions in reliance upon the order.[44] As to equitable mootness the BAP determined that, because third parties would be impacted if the sale were entirely unwound, review of the sale itself was equitably moot, and for this reason the court stated that it could not reverse the sale.[45] But the court distinguished the sale itself from stripping the junior lien, stating that mootness only pertained to the sale itself (bare title), and found that because reversal of the stripping of the junior lien would not have a negative impact on "third parties" the "lien stripping aspect of the Sale order [was] not equitably moot."[46]

On this point however the BAP ignored the unanticipated and adverse effect that lien stripping had on the senior lender. The senior lender gave up its lien to purchase the property—had it not done so it would have maintained its priority over the junior lien and necessarily would have been paid in full before the junior

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declined to follow *Clear Channel* on its 363(m) holding, stating that "[a] sale that involves lien-stripping under § 363(f) is still by its terms a sale under subsection (b) or (c). A reversal of the bankruptcy court's authorization to sell free and clear amounts to 'a modification on appeal' of the authorization to sell. In this Court's view, such a reversal would be plainly contrary to the mandate of § 363(m), which insulates § 363(b) and (c) sales from judicial review." No. CV 10-0766, 2011 WL 2312090, at *3 (C.D. Cal. June 7, 2011).

[39] USDA v. BET Assoc. IV, LLC (*In re* Lehigh Coal and Navigation Co.), No. 3:10-cv-1440, slip op. at *2, n.1 (M.D. Pa. May 4, 2011).

[40] *See, e.g.*, *In re Nashville Senior Living, LLC*, 407 B.R. at 231 (arguing "the overwhelming weight of authority disagrees with [*Clear Channel*]").

[41] Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), 391 B.R. 25, 33 (B.A.P. 9th Cir. 2008).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 34.

[46] *Id.*

received any money.[47] Under the BAP's ruling, the senior's position was effectively subordinated to the junior lien—when the senior ultimately sells the property, the junior lienholder will be paid in full before the senior lender receives any sale proceeds. Furthermore, the senior lender, relying on the bankruptcy court's sale authorization order, agreed to pay an amount up to $800,000 to the Trustee for administrative fees and other expenses, in addition to the purchase price.[48] The senior lender also agreed, pending closing of the sale, not to seek relief from the automatic stay.[49] Had it sought and obtained such relief, it could have foreclosed on the property in which case it would have been entitled to all of the foreclosure sale proceeds up to the amount of its loan; or if it were the winning bidder at the foreclosure sale, it would have acquired the property free and clear of the junior lien.[50]

This inequitable result is inconsistent with Ninth Circuit policy on this issue, as cited to in the *Clear Channel* opinion itself: "The policy behind mootness is to 'protect the interest of a good faith purchaser . . . of the property.'"[51] Although "good faith" is undefined for this purpose in the Bankruptcy Code, the BAP acknowledged that the senior lender was in fact a good faith purchaser.[52] The court nonetheless reasoned that, because the senior lender was "aware of the risks of going forward with the sale," it thereby put itself in a less equitably advantageous position than that of third parties who "acted in reliance on the bankruptcy court's orders."[53] But the facts upon which the court relied for its holding could all have been found in the bankruptcy case file, which is a matter of public record. What the senior lender knew, as did the "third parties," was that the bankruptcy court had ordered the sale free and clear, and the senior lender relied on that order in making its purchase.[54]

Section 363(m) codifies the equitable mootness doctrine with respect to 363 sales, bringing the third basis for mootness, statutory mootness, into play.[55] In the interest of eliminating uncertainty with respect to sales, to provide fairness to purchasers, and precisely to avoid situations such as occurred in *Clear Channel*, section 363(m) appears to provide virtually unqualified protection to the purchaser:

> The reversal or modification on appeal of an authorization . . . 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

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[47] *See* 11 U.S.C. § 724(b) (2006).
[48] *In re PW, LLC*, 391 B.R. at 31.
[49] *Id.*
[50] Scripps GSB I, LLC v. A Partners, LLC (*In re* A Partners, LLC), 344 B.R. 114, 119–20 (discussing effects of foreclosure on junior lienholder).
[51] *In re PW, LLC*, 391 B.R. at 34 (citation omitted).
[52] *See id.* at 32.
[53] *Id.* at 34.
[54] *See id.* at 36.
[55] *See* John Collen, *Section 363(m) Title Endorsements*, 4 J. BANKR. L. & PRAC. 531, 532 (1995) (stating "[s]ection 363(m) codifies principles of mootness").

> pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.[56]

Facially, the statute appears to unambiguously apply to the sale at issue in *Clear Channel*. The BAP, however, held that because section 363(m) is limited to "sale(s) or lease(s)," rather than sales, *uses*, or leases (as in 363(b)), 363(m) only protects the bare sale itself, and does not apply to the lien-stripping terms of the sale.[57] The BAP concluded:

> This limitation leads us to conclude that Congress intended that § 363(m) address only changes of title or other essential attributes of a sale, together with the changes of authorized possession that occur with leases. The terms of those sales, including the 'free and clear' term at issue here, are not protected.[58]

Even if one were to accept the court's statutory construction, however, it would not appear to preclude application of section 363(m) to the facts at issue in *Clear Channel*. There the senior lender's loss of free and clear title amounted to such a significant reduction in its equity in the property, that the senior lender would not likely have purchased the property without a free and clear order.[59] As a result, it would appear that free and clear title was an essential attribute of the sale.

Clear Channel's holding on mootness was rejected by the Sixth Circuit BAP in *In re Nashville Senior Living, LLC*, which stated that "the overwhelming weight of authority disagrees with [*Clear Channel's*] holding that the section 363(m) stay does not apply to the 'free and clear' aspect of a sale under section 363(f)," and that "*Clear Channel* appears to be an aberration in well-settled bankruptcy jurisprudence applying § 363(m) to the 'free and clear' aspect of a sale under § 363(f)."[60] The Eighth Circuit followed the reasoning set forth in *Nashville* and declined to follow *Clear Channel* as well.[61] Similarly, in *In re Thorpe Insulation Co*. the bankruptcy court in the Central District of California declined to follow *Clear Channel*.[62] In *Thorpe*, the appellants argued that although a section 363 sale could not be reversed on appeal unless the sale had been stayed, section 363(m) did not apply to an appeal of the bankruptcy court's removal of other interests that were attached to the property being sold.[63] Acknowledging that *Clear Channel* supported appellants' position, the court nonetheless declined to follow *Clear Channel*, stating that *Clear*

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[56] 11 U.S.C. § 363(m) (2006).
[57] *In re PW, LLC*, 391 B.R. at 35.
[58] *Id.* at 35−36.
[59] *See id.* at 36.
[60] *In re* Nashville Senior Living, LLC, 407 B.R. 222, 231 (B.A.P. 6th Cir. 2009).
[61] United States v. Asset Based Res. Grp., LLC, 612 F.3d 1017, 1019 n.2 (8th Cir. 2010) (citing cases where court has "consistently applied this principle in the bankruptcy context").
[62] *See In re* Thorpe Insulation Co., No. CV 11-668, 2011 WL 1378537, *1 (C.D. Cal. April 11, 2011).
[63] *Id.*

Channel had "been widely criticized by courts and commentators and is generally unpersuasive . . . and [is] in strong tension with a Ninth Circuit opinion that dismissed an appeal of a sale of estate property as moot even where a lien was removed from the property as part of the sale."[64]

Rejection of *Clear Channel* has not been unanimous. *Clear Channel* was followed in a recent Pennsylvania district court (unpublished) slip opinion in *Lehigh*, *supra.*[65] Although one might argue that *Lehigh* is not well reasoned and against the weight of authority (that is to say, against everything except *Clear Channel)*, the opinion perhaps serves as a reminder of the perils of relying on outlying precedent in jurisdictions where bankruptcy issues are unsettled. The court in *Lehigh* found *Clear Channel* to be on point and followed it.[66] *Lehigh* is discussed in more detail *infra.*

B. Clear Channel*'s Holdings on Lien Stripping under 363(f)*

Having determined that the appeal was not moot and therefore could be heard, the BAP then addressed the substantive issue of whether any provisions of section 363(f) permitted the stripping of the junior lien.[67] The BAP found that none of section 363(f)'s provisions had been satisfied.[68] The Court summarily dismissed subsections 363(f)(1), (2), and (4) as inapposite on the facts before it, and then addressed subsection (3).[69]

1. Section 363(f)(3) – price exceeds value of liens

Subsection (3) permits a sale free and clear of an interest if "such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property."[70] The trustee and the senior lender asserted that the "aggregate value of all liens" means the economic value of the liens, rather than their face value.[71] The court acknowledged that "some courts have found that an estate representative may use section 363(f)(3) to sell free and clear of the property rights of junior lienholders whose nonbankruptcy liens are not supported by the collateral's value," and cited to a number of cases so holding.[72] But the court rejected this argument, stating that this interpretation would "essentially mean" that an estate "could sell property free and clear of any lien" and cited to cases

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[64] *Id.*
[65] USDA v. BET Assoc. IV, LLC (*In re* Lehigh Coal and Navigation Co.), No. 3:10-cv-1440, slip op. (M.D. Pa. May 4, 2011).
[66] *See id.* at *2 n1.
[67] Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), 391 B.R. 25, 37 (B.A.P. 9th Cir. 2008).
[68] *Id.* at 30.
[69] *Id.* at 37.
[70] 11 U.S.C. § 363(f)(3) (2006).
[71] *In re PW, LLC*, 391 B.R. at 39.
[72] *Id.* at 40.

construing the statute as referring to face value.[73] The court advanced a further argument in favor of its position based on the use of the words "greater than" in subsection (f)(3), stating that if "aggregate value" referred to the value of the allowed secured claims then the total of all allowed secured claims would necessarily equal but not exceed the sales price, so that even under this interpretation the provisions of (f)(3) would not be fulfilled.[74]

2. Section 363(f)(5) – existence of a qualifying proceeding

The BAP then held that the applicability of subsection (f)(5) had not been established. Subsection (f)(5) provides that a trustee may sell property free and clear of interests in the property if the party holding that interest "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."[75]

The trustee asserted that a cramdown under section 1129(b)(2) was a qualifying proceeding under which the junior lender could have been compelled to accept a money satisfaction for less than full payment of its interest, and cited to cases so holding.[76] The BAP disagreed, finding that this would "[sanction] the effect of cramdown without requiring any of § 1129(b)'s substantive . . . protections."[77] Having found that none of the provisions of subsection (f) had been established, the court reversed "that part of the bankruptcy court's order that held that, under § 363(f)(5), the sale was free and clear of [the junior] lien."[78] However, the BAP left open the possibility that the junior lien could still be stripped, remanding to the lower court to provide the trustee and/or the senior lender an opportunity to "identify a qualifying proceeding under nonbankruptcy law (if one exists) that would enable them to strip [the junior] lien and make the sale of [the debtor's] property to [the senior lender] free and clear under § 363(f)(5)."[79] Following the BAP's decision the parties settled their dispute, obviating the remand and the quest to identify a qualifying proceeding.[80]

Several courts and commentators have identified state law foreclosure as a qualifying proceeding under the facts of the *Clear Channel* case.[81] Indeed, a

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[73] *Id.*
[74] *See id.* at 40–41.
[75] 11 U.S.C. § 363(f)(5).
[76] *See In re PW, LLC*, 391 B.R. at 46.
[77] *Id.*
[78] *Id.* at 47.
[79] *Id.*
[80] *See* Order Closing Case, No. 2:06–bk-16059 (Oct. 20, 2011); Stephen B. Kukin, David M. Dunn & Scott L. Alberino, *Free And Clear Asset Sales Through Section 363*, AKIN GUMP (Oct. 14, 2008), *available at* http://www.akingump.com/files/Publication/c7c6eea24b16436d9bcf05bdf30cf367/Presentation/PublicationAttachment/566c714dbfdc41378a921471c895dafc/Free%20And%20Clear%20Asset%20Sales%20Through%20Section%20363.pdf.
[81] *See, e.g.*, *In re* Jolan Inc., 403 B.R. 866, 870 (Bankr. W.D. Wash. 2009) (holding that *Clear Channel* did not preclude free and clear 363 sale, and noting that "were the trustee proposing to sell real property, judicial

properly conducted foreclosure sale extinguishes all liens which are junior to that of the foreclosing lender[82] (though the junior lienholders will be paid in their order of priority with any surplus remaining after the senior lien is satisfied).[83] In *Clear Channel*, given that the petition was filed on the eve of the senior lender's foreclosure sale, such remedy was clearly available under the facts of that case.[84] Accordingly, the previously pending foreclosure sale clearly was a qualifying proceeding under section 363(f)(5) justifying stripping of the junior lien.[85] As a result, a court need not decline to follow *Clear Channel* in order to invoke the free and clear protection of section 363. Instead, assuming the senior loan to be in default, it simply needs to recognize state law foreclosure as a qualifying proceeding permitting a free and clear sale under the subsection.[86]

III. IMPLICATIONS OF *CLEAR CHANNEL* GOING FORWARD

With respect to mootness, the author is aware of only one case ("*Lehigh*") following *Clear Channel* in holding that 363(m) protects solely bare title, permitting a junior lienholder (through appeal) to reassert its lien status following the entry of a free and clear sale order.[87] As a result, in most jurisdictions, prospective buyers at a section 363 sale may comfortably rely on the free and clear

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and nonjudicial foreclosures in Washington operate to clear junior lienholders' interests" so as to permit application of subsection (f)(5)); George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 251−52 (2002) ("[F]oreclosure sales are commonly recognized hypothetical proceedings that can satisfy § 363(f)(5).") (footnote omitted)); Levitin, Gordon & Stieglitz, *supra* note 12, at 52. ("Presumably 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."); *accord* Frank A. Oswald & Andy Winchell, *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*, NORTON BANKR. LAW ADVISER, April 2009, 4, 8 ("[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).").

[82] *See, e.g.*, Streiff v. Darlington, 68 P.2d 728, 729 (Cal. 1937) ("Assuming the appellants to have been the purchasers at the sale, they acquired title to the real property free from all claims subordinate to their deed of trust or subject to all prior liens and titles.").

[83] *See, e.g.*, CAL CIV. CODE § 2924k(a) (2011).

[84] Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), 391 B.R. 25, 31 (B.A.P. 9th Cir. 2008).

[85] Had the foreclosure sale gone forward, it appears that the junior lender would have received nothing since no bidder appeared (after marketing by a real estate broker) willing to pay more than 60% of the senior lender's credit bid. *Id.* at 32.

[86] *See In re* Boston Generating, LLC, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010) ("Section 363(f)(5) does not require that the sale price for the property exceed the value of the interests. As recognized in a post-*Clear Channel* decision from a Bankruptcy Court in the Ninth Circuit, the existence of judicial and nonjudicial foreclosure and enforcement actions under state law can satisfy section 363(f)(5). *See In re* Jolan, Inc., 403 B.R. 866, 870 (Bankr. W.D. Wash. 2009). Numerous legal and equitable procedures exist by which the Second Lien Lenders could be forced to accept less than full payment of the Second Lien Debt. Thus, the Court finds that because the Second Lien Lenders could be compelled under state law to accept general unsecured claims to the extent the sale proceeds are not sufficient to pay their claims in full, section 363(f)(5) is satisfied.").

[87] *See* USDA v. BET Assoc. IV, LLC (*In re* Lehigh Coal and Navigation Co.), No. 3:10-cv-1440, slip op. at *3 (M.D. Pa. May 4, 2011).

sale order as being immune from attack.[88] Nonetheless, as stated *infra*, in jurisdictions not explicitly rejecting *Clear Channel's* holding on section 363(m), the prudent purchaser at a 363 sale may want to condition its purchase so that closing occurs only after a favorable appeal is no longer possible.

Now the question arises: Under what circumstances is a free and clear sale order in fact authorized by section 363(f)?

A. Lien Stripping Junior Loans

Given the availability of a senior foreclosure sale, lien stripping should generally be available with respect to all junior loans. The recent decision *In re Jolan*, *supra*, serves as an example. In *Jolan*, the second lienholder, citing to *Clear Channel* for support, contended that the bankruptcy court could not authorize a sale free and clear over its objection unless its claim was to be paid in full.[89] The court, however, noted that this result does not follow from *Clear Channel*'s holding, since the parties in *Clear Channel* failed to present to the court any qualifying legal or equitable proceedings (other than cramdown under section 1129) and the court limited its ruling to the arguments presented, leaving open the possibility of a free and clear sale if a suitable non-bankruptcy qualifying proceeding were identified.[90] The *Jolan* court went on to authorize a free and clear sale under section 363(f)(5) "[b]ecause there are in Washington legal and equitable proceedings by which lienholders may be compelled to accept money satisfactions."[91] The court in *Jolan* then identified a number of (hypothetical) qualifying proceedings, including foreclosure, and entered an order authorizing an auction free and clear of liens.[92]

The reasoning of *Jolan* was followed in *In re Boston Generating, LLC*, wherein the court found that "[n]umerous legal and equitable procedures exist[ed] by which the Second Lien Lenders could be forced to accept less than full payment of the Second Lien Debt,"[93] from which it followed that "because the Second Lien Lenders could be compelled under state law to accept general unsecured claims to the extent the sale proceeds [were] not sufficient to pay their claims in full, section 363(f)(5) [was] satisfied."[94]

However, some courts take a more restrictive view of what constitutes a qualifying proceeding. In *In re Harris*,[95] for example, the chapter 11 debtor, a homeowner, filed a plan pursuant to which he sought to sell his principal residence

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[88] *See, e.g.*, Lawrence Peitzman, *Clear Channel: An Appeal for Reinterpretation*, 30 CAL. BANKR. J. 287, 287 (2010) (suggesting courts do not follow *Clear Channel* because it would become difficult for bankruptcy trustees and chapter 11 debtors to arrange sales of assets free and clear of liens).

[89] *In re* Jolan Inc., 403 B.R. 866, 867 (Bankr. W.D. Wash. 2009).

[90] *Id.* at 869–70.

[91] *Id.* at 870 (footnote omitted).

[92] *Id.*

[93] *In re* Boston Generating, LLC, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010).

[94] *Id.*

[95] No. 10–74280–wsd, 2011 WL 5508861 (Bankr. W.D. Mich. Nov. 7, 2011).

free and clear of a senior lien.[96] The debtor contended that section 363(f)(5) permitted such a sale, stating that section 1123(a)(5)(D) (permitting generally the sale of estate property where necessary to implement a plan) presented a qualifying legal proceeding.[97] This argument was rejected in *Harris*, as the court found that modification of the rights of the lien holder was impermissible under section 1123(b)(5) (providing that a plan may not modify the rights of a holder of a claim secured only by a security interest in debtor's principal residence), so that the suggested qualifying legal proceeding was unavailable under the facts before it.[98] In short, the court rejected the proposed proceeding as merely hypothetical and required instead that the proposed proceeding be actually available under the facts of the case.[99] As a result, a court adopting a restrictive view of a qualifying proceeding might reject foreclosure as a qualifying proceeding unless the senior loan was actually in default and the senior lender was entitled to foreclose as a result of such default. By contrast, the court in *Jolan* did not require that foreclosure actually be available.[100] In that case, the debtor had merely failed to pay rent to its landlord, and the opinion did not recite facts that would establish that the senior loan was in default.[101]

Thus, in cases where the senior loan is not actually in default, whether foreclosure is a qualifying procedure will depend on whether the court interprets section 363(f)(5) narrowly—to include only those proceedings actually available—or broadly—to include merely hypothetical proceedings. If the court adopts a broad interpretation, lien stripping of the junior lien will always be available because senior lender foreclosure is always available, at least hypothetically. Indeed, under a broad interpretation, lien stripping will always be available even as to senior liens because there are two non-bankruptcy proceedings that are hypothetically available to eliminate all liens: a tax lien sale and an eminent domain proceeding.

In the case of real estate, a tax lien sale would apply in those states where tax liens exist year round on real properties. Thus, in California, for example, a lien for real estate taxes attaches to each property on January 1st even though such taxes are not delinquent until December of that same year (as to 50%) and in April of the following year (as to the other 50%).[102] As a result, each parcel of real property in California is typically encumbered with a real estate tax lien at all times.[103] Since a real estate tax lien primes all private liens on the property regardless of the time of

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[96] *See id.* at *1.

[97] *See id.* at *2.

[98] *See id.* at *3. Section 1123(a)(5)(D) provides that "a plan shall . . . (5) provide adequate means for the plan's implementation, such as . . . (D) [the] sale of all or any part of the property of the estate, either subject to or free of any lien[. . . .]" 11 U.S.C. § 1123(a)(5)(d) (2006).

[99] *See In re Harris*, 2011 WL 5508861, at *3.

[100] *See In re* Jolan Inc., 403 B.R. 866, 870 (Bankr. W.D. Wash. 2009).

[101] The senior lender in *Jolan* did not oppose the sale. *Id.* at 867.

[102] CAL. REV. & TAX. CODE § 2192 (1995).

[103] *See* Bd. of Supervisors v. Lonergan, 616 P.2d 802, 805 (Cal. 1980) (noting that taxes are payable in two installments on November 1 and April 1 and that first installment becomes delinquent on December 10 and second becomes delinquent on April 10).

their creation,[104] all private liens are at least hypothetically subject to being extinguished in a tax lien sale.[105] As to eminent domain proceedings, as one commentator has suggested, such proceedings are at least hypothetically available throughout the country and typically entitle the condemning authority to extinguish even a senior lien.[106] Thus, a broad reading of section 363(f)(5) would result in lien stripping in all cases due to the hypothetical availability of tax lien sales and eminent domain proceedings. Such an interpretation, however, would render moot section 363(f)(3) which authorizes 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."[107] Accordingly, the broad interpretation violates "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute."[108] Consequently, section 363(f)(5) should be interpreted narrowly to apply to only those proceedings actually available under the facts of the case.

1. Lehigh Coal

In *In re Lehigh Coal*,[109] the district court disallowed lien stripping of a sold out junior without consideration of the applicability of section 363(f).[110] Instead, the court invoked the adequate protection requirement of section 363(e) as its sole ground for denial of lien stripping.[111] In *Lehigh*, the debtor ("Lehigh Coal") had obtained pre-petition loans from the USDA and had granted the USDA a $9 million lien on certain of its properties.[112] Following its bankruptcy filing, Lehigh Coal obtained post-petition financing through its DIP lender ("BET"), and granted the USDA an additional lien on certain mineral rights, in satisfaction of adequate protection requirements.[113] The DIP financing resulted in the priming of the USDA's pre-petition lien.[114] After some period of time, the debtor found it necessary to sell virtually all of its property, and it obtained a court order authorizing the sale of its assets free and clear of liens pursuant to section 363.[115]

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[104] CAL. REV. & TAX. CODE § 2192.1.
[105] *Id.* at § 3712 (failing to include private liens in list of encumbrances that end at time of sale).
[106] Alec P. Ostrow, *The Odd Free and Clear Sale, or Clear-Channeling the Spirit of Subsections (3) and (5) of Section 363(f)*, NORTON ANN. SURV. BANKR. L. 91, 97 (2009) (concluding that by one interpretation, every interest in property is reducible to money).
[107] 11 U.S.C. § 363(f)(3) (2006).
[108] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. ___, No. 11-166, slip op. at 6 (May 29, 2012) (citation omitted).
[109] No. 5-08-bk-51957, 2012 WL 27465, at *1 (Bankr. M.D. Pa. Jan. 5, 2012).
[110] *See id.* at *4.
[111] *See id.*
[112] *Id.* at *1.
[113] *Id.*
[114] *Id.*
[115] *Id.*

BET became the stalking horse by credit bidding its lien.[116] No higher bidder was forthcoming, and Lehigh Coal's property was sold to BET free and clear of liens.[117]

Following the sale, and without having obtained a stay of the sale, the USDA appealed the order approving the sale.[118] The USDA contended that section 363(f) was not satisfied, and further that even if section 363(f) was met, the USDA was deprived of adequate protection under section 363(e).[119] Ruling on the appeal, the district court held first that *Clear Channel* "was persuasive" as to mootness, and that "the appeal [was] not moot on the question of whether the sale free and clear of USDA's liens was proper."[120] The court then held that section 363(f) had been satisfied, but held that the bankruptcy court erred in finding in its sale order that "the USDA could be adequately protected by having its encumbrances attach to the proceeds of the § 363 sale, where . . . the record evidence establishes that [no proceeds] were generated."[121] The district court issued an order vacating that portion of the bankruptcy court's order holding that the USDA was adequately protected and remanded back to the bankruptcy court to resolve the adequate protection issue.[122]

On remand the bankruptcy court, somewhat reluctantly, found that it had no alternative other than to allow the USDA's lien "to remain attached to the property conveyed and have the current owner of the property deal with it."[123]

Lehigh then not only follows *Clear Channel* with respect to section 363(m), but extends *Clear Channel* by holding that section 363(f) cannot be used to strip a junior lien when the sale generates no proceeds that can be applied in satisfaction of the junior lien.[124] The *Lehigh* case is too recent to have generated any discussion. While it is questionable whether this holding will be followed, the case nonetheless serves as a caution of the potential peril that can befall a section 363 purchaser, particularly one who (as in both *Lehigh* and *Clear Channel*) purchases through credit bidding.

Lehigh does not rest on solid ground. First, its emphasis on the lack of *any* sale proceeds is misplaced. Suppose that BET had possessed the foresight (some might call it mistrust) to throw in an extra (hard cash) dollar over its credit bid, for the benefit of the USDA. Would this suffice to extinguish the junior lien? One would think not. But then, neither should an extra hundred, or thousand. Carried to its

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[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *See* USDA v. BET Assoc. IV, LLC (*In re* Lehigh Coal and Navigation Co.), No. 3:10-cv-1440, slip op. at *1,*2, *6 (M.D. Pa. May 4, 2011).
[120] *Id.* at *2 n1.
[121] *Id.* at *8.
[122] *Id.*
[123] *In re* Lehigh Coal No. 5-08-bk-51957, 2012 WL 27465, at *4 (Bankr. M.D. Pa. Jan. 5, 2012).
[124] *Id.* (quoting district court's finding that "the bankruptcy court clearly erred in finding that the USDA could be adequately protected by having its encumbrances attach to the proceeds of the § 363 sale, where the bankruptcy court failed to find that proceeds were generated and the record evidence establishes that none were generated").

logical conclusion, as was pointed out by the bankruptcy court in its remand opinion, the practical result of the district court's ruling is that "a free and clear sale under [section 363(f)(3)] could not take place without paying off the liens in full."[125] *Lehigh*, if followed, would mean that there can be no lien stripping under 363(f). As a result, the case is inconsistent with every section 363(f) case in which lien stripping occurs.[126]

Second, *Lehigh* incorrectly assumes that "adequate protection" requires that a junior lien remain attached to the underlying property following its post-petition 363 sale, notwithstanding the fact that the junior lien was entirely out of the money at the time of the sale.[127] Adequate protection does not serve to protect the junior lienholder from a post-petition decline in the value of collateral—the junior lienholder is entitled to compensation only to the extent that the sale proceeds are available after payment of superior liens.[128] Paying the junior lienholder an amount in excess of the value realized at a sale would give the lienholder a windfall to the detriment of either the purchaser or the other creditors.

Section 363 sale orders typically fulfill adequate protection requirements by declaring that liens on the sale property will attach to the sale proceeds.[129] The legislative history of section 363(f) appears to sanction this practice, stating that a "[s]ale under [section 363(f)] is subject to the adequate protection requirement. Most often, adequate protection in connection with the sale free and clear of other interests will be to have those interests attach to the proceeds of the sale."[130] Thus, in *In re Healthco International, Inc.*,[131] the trustee sought authority to sell real estate free and clear of a county tax lien.[132] The county contended that section 363(f) was not satisfied and that the sale would deprive it of its lien without providing adequate

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[125] *Id.* at *2. The bankruptcy court's statement on this issue was directed towards 363(f)(3), but logically it applies with equal force to a ruling under 363(f)(5) permitting the stripping of junior liens. The district court in Lehigh actually found that section 363(f)(2) was met, because the USDA had consented to the sale. The point is that the district court's ruling applies *whenever* 363(f) is met, with the result that a free and clear sale can never be consummated unless the junior lienholder is "adequately protected" by receiving a payment from the proceeds of the sale.

[126] *See, e.g.*, *In re* Namco Capital Grp, Inc., No. CV 10-0766, 2011 WL 2312090, at *2 (C.D. Cal. June 7, 2011) (discussing how trustee is authorized to make sale free and clear under 363(f)).

[127] *But see* Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), 391 B.R. 25, 34 (B.A.P. 9th Cir. 2008) (noting that panel could reverse transfer and hold that junior creditor remain attached to property).

[128] *See* Jacob A. Kling, *Rethinking 363 Sales*, 17 STAN. J.L. BUS. & FIN. 258, 260 (2012) (noting that absolute priority principle requires senior creditors be paid in full before junior claimants receive any value).

[129] The order authorizing the sale at issue in *Lehigh* stated, in a manner that is typical of such sale orders, that the holders of encumbrances (including liens) were "adequately protected by having their Encumbrances, if any, attach to the proceeds of the sale of the assets ultimately attributable to the property against or in which they hold or claim any Encumbrances." Order (A) Approving Asset Purchase Agreement and Authorizing the Sale of Assets of Debtor and Debtor-in-Possession Outside the Ordinary Course of Business; (B) Authorizing the Sale of Assets free and Clear of all Liens, Claims, Encumbrances and Interests; (C) Authorizing the Assumption and Assignment of a Certain Executory Contract; and (D) Granting Related Relief at 6., *In re Lehigh Coal and Navigation Co.*, No. 08-51957 (May 28, 2010).

[130] H.R. REP. NO. 95-595, at 345 (1977), reprinted in U.S.C.C.A.N. 5878, 6302.

[131] 174 B.R. 174 (Bankr. D. Mass. 1994).

[132] *Id.* at 175.

protection as required by section 363(e).[133] The court found that 363(f) had been met and that adequate protection had been given by transferring the lien to the proceeds, even though the proceeds were insufficient to pay anything to the county.[134]

2. Lien Stripping Senior Loan

In the case of a senior loan, there is by definition no higher priority lender who could extinguish the senior lender's lien through foreclosure. It is true that the senior lender's lien is extinguished by its own foreclosure sale. However, in order to satisfy section 363(f)(5), the qualifying proceeding must be capable of *compelling* the entity holding the lien to accept a money satisfaction of its interest.[135] The senior lender cannot be compelled to initiate its own foreclosure sale.[136] If the foreclosure is initiated by a junior lienholder, state law *preserves* the senior lien such that it encumbers the purchaser's interest in the property.[137]

It is possible that a qualifying state law proceeding may exist permitting extinguishment of a senior lien. One of the qualifying proceedings identified in *Jolan* was a sale made by a receiver, with the court noting that under Washington law "the receiver may sell free and clear of even the interests of first lienholders."[138] However, the court made no attempt to point to facts in the case before it which would support the appointment of a receiver.[139] And under the narrow interpretation of section 363(f)(5), such facts would have to exist to invoke the lien stripping effect of such section.

As discussed above, a senior lien is subject to extinguishment in a tax lien sale as well as a condemnation proceeding.[140] However, such proceedings are rarely applicable. In the case of tax lien sales, in most states, such sales may be held only after a long period of delinquency—for example, three years in the State of California for commercial property.[141] In the case of condemnation proceedings, the government's power of eminent domain is not unlimited: it may be exercised only for public use[142] and typically requires formal approval by the applicable condemning authority.[143] More importantly, if the property really were subject to an eminent domain proceeding it is difficult to see how that same property could be

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[133] *Id.*
[134] *See id.* at 177.
[135] 11 U.S.C. § 363(f)(5) (2006).
[136] *See id.* at § 363(c)(2)(A).
[137] *In re* Boston Generating, LLC, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010) (holding that second lien lenders could be compelled under state law to accept general unsecured claims if sale proceeds are insufficient).
[138] *In re* Jolan Inc., 403 B.R. 866, 870 (Bankr. W.D. Wash. 2009).
[139] *See id.*
[140] *See id.*
[141] CAL. REV. & TAX. CODE § 3691(a)(1)(A) (1995).
[142] *See* Kelo v. City of New London, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting).
[143] *See id.* at 488 (discussing additional obstacle governments must overcome before exercising their eminent domain power).

sold in a section 363 sale. As a result, a narrow reading of section 363(f)(5) would likely preclude the invocation of either a condemnation proceeding or a tax lien sale as a qualifying proceeding, since such proceedings will rarely be available under the facts of the case.

In short, in the vast majority of cases and assuming a narrow reading of section 363(f)(5), there will not exist any qualifying proceeding to authorize lien stripping of a senior loan under section 363(f)(5). But all hope is not lost for the trustee. First, the senior lienholder, fearing a further decline in the value of its collateral, may consent to the sale, fulfilling 363(f)(2).[144] If not, the trustee may be able to employ 363(f)(3) to obtain a free and clear sale order.[145] As was pointed out by the BAP in *Clear Channel*,[146] there is a split of authority as to whether 363(f)(3) permits a sale free and clear of out-of-the-money liens. For those courts holding that it does, a senior lien can be stripped under section 363(f)(3).[147] While the cases on this issue roughly follow circuit divisions, the split is by no means uniform and in the absence of Circuit level precedent, precedent can even be split from district to district within a circuit.[148]

CONCLUSION

In those jurisdictions (such as 6th and 8th Circuits) declining to follow *Clear Channel* and which hold that the 363(m) stay applies to lien stripping, the buyer at a 363 sale can proceed knowing that it will acquire the property free and clear without risk of reversal on appeal. In other jurisdictions (not expressly rejecting *Clear Channel*), we have seen that the weight of authority nonetheless refuses to follow *Clear Channel*, even in the Ninth Circuit. However, as *Lehigh* illustrates, the 363 purchaser remains at some peril therein, as there remains the potential for an aberrant decision, allowing successful appeal of the lien stripping order, and a cautious buyer may wish to condition the closing of its purchase on the occurrence of either (1) the expiration of the appeal period; or (2) appellate affirmance of the sale on appeal.

Buyers wishing to evaluate the probability of obtaining a free and clear order from the bankruptcy court should in the first instance determine how their jurisdiction interprets the meaning of 363(f)(3). If they are in a jurisdiction which holds that 363(f)(3) allows a free and clear order to issue when the price exceeds the value of the property encumbered by the liens, then a sale at fair market value will

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[144] 11 U.S.C. § 363(f)(2) (2006).

[145] *See id.* at § 363(f)(3).

[146] *See supra* Part B.1, text accompanying notes 78–79 (citing to cases on each side of issue).

[147] 11 U.S.C. § 363(f)(3); *see, e.g., In re* Beker Indus. Corp., 63 B.R. 474, 476–77 (Bankr. S.D.N.Y. 1986); *see also In re* Boston Generating, LLC, 440 B.R. 302, 332 (Bankr. S.D.N.Y. 2010).

[148] *See, e.g.*, *In re* Nance Properties, Inc., No. 11-06197-8-JRL, 2011 WL 5509325, at *4 (Bankr. E.D.N.C. Nov. 8, 2011) ("This court acknowledges that both interpretations of § 363(f)(3) have valid justifications. . . . However, while the court sympathizes with the debtor's position, the decision of the District Court for the Eastern District of North Carolina in *Stroud Wholesale* has been the settled law in this district for more than twenty-five years and remains binding on this court.").

likely result in a free and clear order. If they are in a jurisdiction following *Clear Channel*, in order to strip any liens the buyer will have to rely on the existence of a qualifying proceeding under 363(f)(5). In this case, the buyer should be prepared to demonstrate the existence of a qualifying proceeding and, if possible, the facts showing the applicability of such a proceeding. In the case of a junior lien, the vast majority of the courts have recognized the potential foreclosure by the senior lender as such a qualifying proceeding. Nonetheless, a cautious buyer may wish to demonstrate that the senior lien is actually in default and is legally entitled to foreclose but for the existence of the automatic stay. If the lien to be stripped is itself the senior lien, the existence of a qualifying proceeding will depend on state law, the facts of the case and whether the bankruptcy jurisdiction will recognize a hypothetical proceeding as meeting the qualifying proceeding requirement. If the court adopts a broad reading of what constitutes a qualifying proceeding, any number of proceedings such as a tax sale or an eminent domain proceeding might qualify. If instead, the court interprets this clause narrowly to include only those proceedings actually available under the facts of the case, then it is unlikely that this section will support a free and clear order of a senior lien.