Section 363 Sales in 2009:
The Year The Exception Became The Rule?

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A. Introduction

> "Debtors need flexibility and speed to preserve going concern value; one or more classes of creditors should not be able to nullify Chapter 11's requirements. A balance is not easy to achieve, and is not aided by rigid rules and prescriptions. *Lionel's* multi-factor analysis remains the proper, most comprehensive framework for judging the validity of section 363 transactions."[i]

The Second Circuit used the foregoing rationale, in part, to affirm the order approving the sale of substantially all of Chrysler's assets outside of a plan through a Bankruptcy Code ("Code") section 363 sale. Chrysler is one of several cases decided in 2009 involving the sale of a substantially all of a debtor's assets. Given the state of the credit markets, the paucity of available financing, and the dire straits in which many of these companies landed in bankruptcy in late 2008 and 2009, many of the sales were pursued at an unprecedented pace. General Motors, Lehman Brothers - even the Chicago Cubs – sought to fix their balance sheets by filing chapter 11 cases with the principal aim (and some might say exclusive aim) of selling their assets through what many consider the best title insurance available to a buyer: a section 363 sale order. This article summarizes several of the decisions issued in these sale-based cases.

1. Lehman Brothers-Impact of Code Section 363 Sales Regarding SPEs

The *Lehman Brothers Holding, Inc.* ("LBHI") case represented the largest bankruptcy filing in the United States, and involved one of the fastest section 363 sale processes ever seen. As of September 15, 2008, the date that LBHI filed its chapter 11 case, this was "the largest bankruptcy filing in the history of the United States by a factor of more than six."[ii] The speed with which the sale of assets to Barclays, PLC ("Barclays") took place was breathtaking. On Monday LBHI filed the bankruptcy case, on Tuesday the court conducted a hearing on "first day" pleadings, on Wednesday LBHI filed a motion to sell its assets, including most prominently its broker-dealer operations, on Friday the court conducted a hearing on the sale motion, and at the conclusion of the hearing (the hearing was concluded after midnight on Saturday) the court approved the sale over numerous objections.

Prior to the filing of its case, LBHI had engaged in discussions regarding the sale of its broker-dealer business to Barclays. LBHI was unable to advance the sale outside of bankruptcy given, among other reasons, Barclays' reluctance to assume a substantial amount of LBHI's liabilities. Through the filing, Barclays was assured that it would acquire title to those assets free and clear of all liabilities, other than those which it had expressly agreed to assume. Given the nature of LBHI's business, and the reported decrease in the value thereof following its filing, Barclays was able to purchase the business for approximately $1.35 billion, less than the $1.75 billion price that had been negotiated immediately after LBHI's bankruptcy filing. Of note, the LBHI bankruptcy estate has now brought litigation against Barclays asserting that Barclays received a "windfall profit" relating to value of the securities transferred to Barclays as part of the sale.[iii]

One noteworthy aspect of the sale process was its impact on so-called "special purpose" or "bankruptcy remote" entities ("SPEs").[iv] In short, a central function of SPEs is that they will remain unentangled with bankruptcy filings by corporate parents or affiliates in a bid to protect lenders' or investors' collateral – the assets of the SPE. According to Professor Richard Lubben, the sale order approved a sale of assets owned by LBHI's direct and indirect subsidiaries which (at that time) were not debtors before the bankruptcy court and, therefore, not subject of the court's jurisdiction. That is, the sale order authorized non-debtors to convey their assets to Barclays free and clear of all liens, claims, interests and encumbrances notwithstanding the fact that the entities that held title to certain of the assets were non-debtors. Thus, not only did the order authorize the sale of assets free and clear of liens pursuant to Bankruptcy Code section 363(f) and successor liability claims, it had the effect of expanding the estate to include the brokerage assets belonging to non-debtors.[v]

This sale, as approved, appears to be consistent with the bankruptcy court's approval of DIP financing and the use of cash collateral in the *General Growth Properties* chapter 11 cases ("GGP"). There, according to a recent article,[vi] GGP and 166 of its subsidiaries, the second largest owners of retail centers in the county, sought authorization to use excess cash flow of GGP's subsidiaries, who are themselves SPEs, to fund the reorganization. That is, GGP sought authority to upstream excess cash from its subsidiaries to fund the reorganization of the entire enterprise.

The request was the subject of numerous objections, including from *amicus curiae*, asserting, *inter alia*, that the request from the SPEs was violative of the prepetition loan documents relied upon by creditors holding commercial mortgage-backed securities ("CMBS"). The court rejected the argument of the CMBS creditors and *amicus curiae* and, in so doing, concluded that the need for financing justified the authorization of the use of cash collateral and outweighed the concerns expressed about market ramifications, *i.e.*, the availability of financing by lenders who would not be assured that their collateral would be excluded from bankruptcy proceedings.[vii] Thus, section 363 of the Bankruptcy Code has now been used to weaken, if not emasculate, the primary if not exclusive purpose of the formation of SPEs.

2. Pacific Lumber/Metaldyne/GWLS/ Philadelphia Newspapers- Equitable Mootness, Credit Bidding and Challenges by Minority Lenders to Actions by Lenders' Agents

Section 363(k) of the Code appears straight-forward in its language and application.[viii] This statute provides secured creditors with the right to "credit bid" their debt in connection with assets sales in bankruptcy. Only secured creditors are permitted to credit bid their claims: the benefits of the statute do not extend to unsecured creditors.[ix]

While the language of the statute may appear to be straightforward, its application in the context of asset sales under a plan has engendered some controversy. The issue first arose prominently in the Fifth Circuit's opinion in *Bank of New York Trust Co., N.A. v. Official Unsecured Creditors' Committee (In the Matter of Pacific Lumber Co.)* ("*Pacific Lumber*") authored by well-respected bankruptcy authority Judge Edith H. Jones.[x] *Pacific Lumber* involved a direct appeal from a bankruptcy court order confirming a chapter 11 plan submitted by a creditor and a competitor of the debtors which contemplated that the plan proponents would receive the debtors' assets which had been pledged to the noteholders ("Noteholders").

The bankruptcy court fixed the value of the Noteholders' collateral at approximately $510 million, much less than their debt which collectively stood at approximately $740 million. The plan provided that the Noteholders were to receive deferred cash payments equal to the value of

their collateral, which the bankruptcy court found was the "indubitable equivalent" of the Noteholders' collateral.[xi] The Noteholders appealed, but failed to obtain a stay pending appeal. The Noteholders made several arguments on appeal, two of which are discussed herein: (1) Was the appeal equitably moot, and (2) Did the plan meet the "fair and equitable" requirement of section 1129(b) where the Noteholders were denied the right to credit bid under a plan that provided for a private sale of their collateral, the value of which was fixed by prior judicial determination.

On appeal, Judge Jones acknowledged that the confirmed plan had been "substantially consummated," but concluded that the "rationale" for applying the doctrine of "equitable mootness" was inapplicable, noting that the Fifth Circuit had been "especially solicitous of the rights of secured creditors following confirmation."[xii] Specifically, after considering prior appellate decisions, including most prominently those from the Fifth Circuit, Judge Jones concluded that the appeal was not equitably moot based on, *inter alia*, the "novel issues raised in the confirmation process," explaining that those issues were deserving of appellate review "notwithstanding the tug of equitable mootness."[xiii]

After finding that the transaction was a "sale," and not a "transfer," Judge Jones rejected the Noteholders' argument that the bankruptcy court erred in confirming the plan which did not provide the Noteholders the ability to credit bid their debt which, as the Noteholders asserted, precluded them from receiving the "indubitable equivalent" of their collateral because the plan did not take into account a possible increase in the value thereof.[xiv] Specifically, Judge Jones explained that the

> Bankruptcy Code, however, does not protect a secured creditor's upside potential; it protects the 'allowed secured claim.' If a creditor were oversecured, it could not demand to keep its collateral rather than be paid in full simply to protect the 'upside potential.'[xv]

Continuing, Judge Jones appears clearly to have believed that objections to confirmation premised on their inability to credit-bid were untimely as the Noteholders did not complain about the valuation process in which they participated.[xvi] Thus, even though she characterized the denial of the right to credit bid as unprecedented, Judge Jones found that despite the inability of the Noteholders to credit bid the plan, the plan which offered to pay the allowed amount of their secured claim in cash, was fair

and equitable and provided them with the “indubitable equivalent” of their collateral (such that there was no requirement that the Noteholders be permitted to credit bid their debt).[xvii] That is, the plan could be confirmed under section 11129(b)(2)(iii) because the plan offered the Noteholders the indubitable equivalent of their debt notwithstanding that the plan provided for the sale of the debtor’s assets as its means of implementation.

The Fifth Circuit’s decision was found to be distinguishable by the bankruptcy court in *In re Philadelphia Newspapers, LLC*.[xviii] The debtors there own, operate print and online publications in the Philadelphia area. As part of the plan, the debtors proposed to sell at auction substantially all of their assets. The assets comprised the collateral of the debtors’ secured lenders who hold claims approximating $295,000,000. The debtors proposed bid procedures in connection with a stalking horse bid that would provide approximately $37 million to the lenders from the proceeds of the sale. The procedures would bar credit bidding by the debtors’ lenders. The bankruptcy court did not approve the bid procedures finding that the debtors proposed a public auction, not a private sale, there had been no pre-confirmation judicial determination of value and, therefore, the right to credit bit “should be an imperative.”[xix] The court concluded that, when a debtor proposes to sell the collateral of an undersecured creditor pursuant to a plan of reorganization, thus cutting off the secured creditor's right to make an election under section 1111 (b), it may not preclude the secured creditor from credit bidding the amount of its secured claim at the sale. In such circumstances, the court held, "the right to tender a credit bid should be an imperative." The court permitted the debtors to proceed with a sale so long as the bid procedures were modified to permit the secured lenders to credit bid at the sale.

The debtors appealed to the district court. The district court reversed.[xx] The district court reasoned that its decision hinged on the application of section 1129(b)(2), which articulates the standard for cramdown of a secured claim. In the court’s view, the two requirements which were pertinent to the appeal were: (1) subsection (b)(2)(A)(ii), which provides for the sale of the collateral free and clear of liens but subject to the right to credit bid (the “Sale Prong”); and (2) subsection (b)(2)(A)(iii), which provides for the realization of the claim by some means which provides the secured creditor with the indubitable equivalent of its claim (the “Indubitable Equivalent Prong”).[xxi] Because the language of section 1129(b)(2) is phrased in the disjunctive, the court reasoned that the statute

provides three distinct alternative arrangements for satisfaction of plan confirmation in the context of cramdown of a dissenting class of secured creditors and that the debtors may select any of these to proceed to confirmation. The court explained:

> Section 1129(b)(2)(A)(iii) provides only that the secured creditor receive the indubitable equivalent of its claim and provides absolutely no reference to the right to credit bid created by section 363(k). Given the contrasting language, it appears that Congress intended to provide three alternative paths to confirmation, one of which (subsection 1129(b)(2)(A)(iii)), does not entitle a secured creditor the right to credit bid at a public auction. Therefore, it was error for the Bankruptcy Court to conclude that the Senior Lenders had a statutory right to credit bid when a plan of reorganization pursued under the Indubitable Equivalent Prong does not guarantee that the Senior Lenders be afforded such a right.[xxii]

The court went on to note that under the Indubitable Equivalent Prong, a secured creditor who is not entitled to credit bid or make an election under section 1111(b) still possesses a deficiency claim that is entitled to vote in both the secured and unsecured classes.[xxiii] "Because the outcomes obtained by application of section 1129(b)(2)(A)(iii) are entirely plausible, a literal application of the plain meaning of section 1129(b)(2)(A) does not produce a result that is either absurd or demonstrably at odds with the intent of Congress."[xxiv] Accordingly, the court found that the debtors could propose a plan that offered the secured lenders the indubitable equivalent of their claims so as to prevent them from credit bidding at the sale. Of note, the court stated expressly that it was not ruling on whether the plan proposed by the debtors could be confirmed as that issue was not before the court.

The secured creditors have appealed the district court's order to Third Circuit Court of Appeals. The court granted a limited stay and as of this writing the appeal is still pending.

Another case involving a credit bid is *In re Metaldyne Corp.*[xxv] in which the bankruptcy court granted the debtors' motion for approval of the sale of substantially all of their assets to a consortium led by two entities representing approximately 97% of the lenders' pre-petition debt. One of the lenders objected to the sale arguing, in relevant part, that the

prepetition lenders' agent could not properly credit bid 100% of the prepetition debt and release liens notwithstanding that 97% of the lenders participated in the consortium and directed the agent to credit bid their debt without the objector's consent. [xxvi] The winning bid (for part of the debtors' assets) was the proposed purchaser, whose bid was comprised of cash, a credit bid component, assumption of liabilities and a release of liens on assets not part of the sale.[xxvii]

The agent for the lender argued that under the applicable loan documents it had the right to credit bid and to release liens on collateral on behalf of all of the prepetition lenders, including the objecting party.[xxviii] After setting forth general principles of contract construction and, relying upon *Indiana State Police Pension Trust v. Chrysler, LLC (In re Chrysler, LLC),*[xxix] the court concluded that the sale though a credit bid did not involve or require an amendment or modification of the loan documents as urged by the objecting lender where the agent was acting on behalf of all of the secured lenders.[xxx] Moreover, the court rejected the argument that the relevant provisions in the loan documents concerning the secured party's right to credit bid prohibited the agent from doing so on behalf of the objecting lender reasoning, in part, that the limitation contemplated an auction conducted pursuant to section 9-611 of the U.C.C., not one conducted pursuant to Code section 363.[xxxi]

The court in *Metaldyne Corp.* also relied upon the decision in *In re GWLS Holdings, Inc.*[xxxii] in which the bankruptcy court construed contractual provisions similar to those before it. In *GWLS Holdings,* the court approved a credit bid by the first lien lenders' agent over the objection of a minority lender. The minority lender (which had made a loan of $1 million as part of a $337 credit facility) argued that unanimous consent of the lenders was required to make a credit bid of the lenders' pre-petition debt, relying on certain provisions in the loan documents.[xxxiii] The *GWLS Holdings* court, like the *Metaldyne Corp.* court, found that the credit bid did not involve or require an amendment or modification to the loan documents.[xxxiv] In so finding, the court construed the phrase "applicable law" in one of the loan agreements giving the agent "all rights and remedies of a secured party under New York U.C.C. or any applicable law" to include the Bankruptcy Code, generally, and section 363k, specifically.[xxxv]

3. Case Law Following Clear Channel Outdoor, Inc.

In *Clear Channel Outdoor, Inc. v. Knupfer (In re PW LLC)*,[xxxvi] the Ninth Circuit BAP held that the junior lienholder's appeal was not moot and that a credit bid by the senior lender did not transfer title to the assets that were sold free and clear of liens of the objecting junior lienor. The sale proceeds were insufficient to satisfy the debt held by the senior lienholder and, therefore, the BAP agreed with the bankruptcy court that the sale could only be justified under Code section 363(f)(5).[xxxvii] On appeal by the junior lender, the purchaser and chapter 11 trustee took the position that the sale was authorized by Code section 363(f)(3) and (f)(5)[xxxviii] and that, regardless, the appeal was moot.[xxxix] The BAP panel granted the appellees' motion to dismiss on mootness grounds, but left it to the merits panel to determine whether the stripping of the junior lien was moot.[xl]

The BAP first held that the appeal was not equitably or statutorily moot; concerning Code section 363(m) the BAP reasoned that that statute did not apply to lien stripping effectuated through a Code section 363(f) sale where Code section 363(m) only made reference to sales authorized by Code section 363(b) and (c).[xli] As an aside, the BAP's ruling on the inapplicability of Code section 363(m) has been explicitly criticized by the Sixth Circuit BAP in *Official Committee of Unsecured Creditors v. Anderson Senior Living Property, LLC (In re Nashville Senior Living, LLC)* for being on the wrong side of the "overwhelming weight of authority" and for disregarding prior Ninth Circuit case law that found Code section 363(m) applicable to "free and clear" asset sales made pursuant to section 363(f).[xlii]

In support of its holding that a junior lienholder's interest could not be stripped via a senior lienholder's credit bid, the BAP adopted the line of authorities standing for the proposition that Code section 363(f)(3) does not authorize a sale free and clear of liens unless, in the words of the statute, the purchase price "is greater than the aggregate value of all liens on such property."[xliii] The authors of a recent article explained that "[a]lthough the BAP addressed only the limited arguments under § 363(f)(3) and (f)(5), the breadth with which the court framed the issue suggests that assets could not be sole free and clear of valid nonconsenting junior liens outside of a plan of reorganization. The decisions in [*In re*] *Wrangell Seafoods* and [*In re*] *Jolan* reject this overly broad reading of *Clear Channel*."[xliv]

There has been much commentary about this decision, including commentary questioning the viability of Code section 363 sales in the Ninth Circuit, but others have noted subsequent decisions within that circuit show that "rumors of the death of § 363 sales in the Ninth Circuit have been greatly exaggerated."[xlv] The authors of Recent Decisions quoted from *Wrangell* as follows:

> The BAP in *Clear Channel* takes a very narrow view of what can occur upon sales made pursuant to 11 U.S.C. § 363(f). I respect the scholarship and reasoning displayed in the decision. However, I disagree with the BAP's conclusion. I tend to take a more liberal view of the statute. Alaska law permits the sale of real and personal property interests by foreclosure sales. The sale is justified under § 363(f)(1) and (5).[xlvi]

In *Jolan*, the court approved a proposed sale of personalty over the objection of secured creditors and, in so doing, held that *Clear Channel* did not preclude a sale free and clear of liens for an amount less than needed to satisfy all liens pursuant to Code section 363(b), but it denied approval of the proposed sale and ordered an auction to be conducted.[xlvii] The court framed the issue as whether Code section 363(f)(5) permits a sale free and clear of liens where the purchase price is in an amount insufficient to satisfy all liens on the property.[xlviii] Interestingly, the court noted that "[a]lthough Clear Channel has generated considerable commentary, it has only [as of April 30, 2009] been cited by courts in thee published opinions" on unrelated issues in two of those cases and the propriety of Code section 363 sales.[xlix]

Importantly, the court noted that the BAP did not address "non-contractual mechanisms whereby a junior lienholder might get less than full payment yet lose those liens."[l] The court noted that there were legal and equitable proceedings in which a junior lienor could be compelled to accept a money satisfaction, citing, among other statutes, section RWC 62A.9A of Washington State's version of the U.C.C. and RCW 7.60.025 pursuant to which a receiver could sell property free and clear of liens.[li] In light of these statutes, the court concluded that Code section 363(f)(5) permitted a sale of personalty free and clear of liens notwithstanding that the sale proceeds might turn out to be insufficient to satisfy all liens on the personalty.[lii]

4. Sales of Substantially All Assets Pre-Confirmation; Successor Liability-General Motors.

In *In re General Motors Corp.*,[liii] the court addressed numerous issues raised by objections to the proposed sale of substantially all of the debtor's assets pursuant to Code section 363, certain of which the authors will address herein. First, the court reaffirmed that substantially all of a debtor's assets can be sold prior to confirmation so long as there exists a good business reason for the sale.[liv] Support for this proposition came from several decisions, including the Second Circuit's decision in *Chrysler*, *supra*, as well as the Supreme Court's decision in *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*[lv]

Further relying upon *Chrysler* , the *General Motors* court similarly rejected the argument that the sale of substantially all of the debtors prior to confirmation *per se* constitutes a so-called *sub rosa* plan.[lvi] In so ruling, the court explained that the concept of *sub rosa* plans emerged from the Fifth Circuit's decision in *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*[lvii] in which the court explained that "the debtor and the Bankruptcy Court should not be able to short circuit the requirements for a Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets."[lviii]

While the court recognized that "[a] proposed sale may be objectionable, for example, when aspects of the transaction dictate the terms of the ensuing plan or constrain parties in exercising their confirmation rights [footnote omitted], such as by placing restrictions on creditors' rights to vote on a plan" or where "the sale itself seeks to allocate or dictate the distribution of sale proceeds among different classes of creditors, [footnote omitted]," but found that those circumstances were not present in the facts before it.[lix]

The court then rejected objections to provisions in the proposed sale order that limited "successor liability" that might otherwise be imposed on the "New GM."[lx] The court explained that the issue of successor liability is an equitable exception to the general rule that a purchaser of assets only assumes the liabilities it expressly agrees to assume, and that the absence of protection from successor liability might well result in a reduction in the purchase price to account for the risk that such liability might be imposed on the purchaser.[lxi] After considering the statutory language in Code

section 363(f), which the court found was inconclusive, the split in the cases nationally, the court concluded it was bound by controlling case law from the Second Circuit—namely *Chrysler*, *supra,* which the court found legally indistinguishable—and rejected the objecting parties' attempt to have the court excise the limitation on successor liability claims from the proposed sale order.[lxii]

B. Conclusion

While in 2009 we saw a large number of important and high profile cases involving sales of substantially all of a debtor's assets outside of a plan, given current market conditions it is reasonable to conclude that we will see more of these filings. Practitioners should consider the foregoing cases when seeking approval of or asserting objections to proposed sales of assets pursuant to Code section 363. While most of these cases break new ground, many reaffirm well-established legal principles.

[i] *In re Chrysler, LLC*, 576 F.2d 108, 116 (2d Cir. 2009), *reversed and vacated as moot, Indiana State Police Pension Trust, et al. v. Chrysler, LLC, et al.*, 2009 WL 2844364 (U.S. Dec. 14, 2009).

[ii] Bryant P. Lee, *Chapter 18? Imagining Future Uses of 11 U.S.C. § 363 to Accomplish Chapter 7 Liquidation Goals in Chapter 11 Reorganizations*, 2009 Colum. Bus. L. Rev. 520, 521 (2009).

[iii] See, *Lehman Brothers Sues Barclays Capital Over $8.2 Billion 'Windfall Profit' Resulting From Sale*, NYDailyNews.com, (Nov. 17, 2009).

[iv] Stephen Lubben, *The Sale of the Century and Its Impact on Asset Securitization: Lehman Brothers* ("Sale of the Century"), 27 Am. Bankr. Inst. J. 1 (Dec./Jan. 2009). Another recent, very high profile case calls this object squarely into question. *See In re General Growth Properties, Inc. et al.,* Case No. 09-11977 (ALG) (Bankr. S.D.N.Y.) ("GGP") (Order dated May 14, 2009 approving use of DIP financing and use of cash collateral of the debtors/SPEs to fund the debtors' chapter 11 reorganization, Docket No. 527).

[v] Sale of the Century, *supra*.

[vi] David Neier, Laura Swihart and Robert Boudreau, *'Bankruptcy Remote' Is Not 'Bankruptcy Proof,'* New York L. Journal (June 29, 2009) ("Bankruptcy Proof").

[vii] Bankruptcy Proof, *supra*.

[viii] "At a sale under subsection (b) of this section [authorizing sales outside the scope of the ordinary course of a debtor's business] 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 the property, such holder may offset such claim against the purchase price of such property." 11 U.S.C. § 363(k).

[ix] *See In re Moritz*, 162 B.R. 618 (Bankr. M.D. Fla. 1994).

[x] 584 F.3d 229 (5th Cir. 2009).

[xi] 11 U.S.C. § 1129(b)(2)(A)(iii).

[xii] 584 F.3d at 240.

[xiii] *Id.* at 242-43.

[xiv] *Id.* at 245.

[xv] *Id.* at 247.

[xvi] *Id.*. "The Noteholders' claimed right to credit bid embraces their additional disagreement with the bankruptcy judge's decision to value the [property] judicially rather than through a public auction." *Id.*

[xvii] *Id.*, *12.

[xviii] 2009 WL 3242292 (Bankr. E.D. Pa. Oct. 8, 2009), *rev'd*, 418 B.R. 548 (E.D. Pa. 2009).
[xix] *Id.*, *9.
[xx] *In re Philadelphia Newspapers, LLC*, 418 B.R. 548 (E.D. Pa. 2009).
[xxi] Id. at 562.
[xxii] Id. at 567.
[xxiii] Id. at 568.
[xxiv] Id.
[xxv] 409 B.R. 671 (Bankr. S.D.N.Y. 2009).
[xxvi] 409 B.R. at 672.
[xxvii] *Id.* at 674.
[xxviii] *Id.* at 676.
[xxix] 576 F.3d 108 (2d Cir. 2009). While the reasoning given by the Second Circuit in *Chrysler* applied, it did not concern credit bidding but instead the issue of whether the collateral agent was authorized to consent to a sale free and clear of liens as to substantially all of the debtor's assets pursuant to section 363(f)(2) of the Bankruptcy Code. The Second Circuit explained that "[t]hrough a series of agreements, the [appellant-pension/retirement funds] effectively ceded to an agent the power to consent to…a sale [free and clear of liens]; the agent gave consent; and the [appellant-pension/retirement funds] are bound." *Id.* at 119. Continuing, the Second Circuit further explained that actions by the agent deemed necessary to protect, preserve or realize upon the collateral as directed lenders holding a majority of the debt was "binding on all lenders, those who agree and those who do not." *Id.* at 120. A more detailed statement of the facts and legal analysis in *Chrysler*, *Metaldyne Corp.*, and *GWLS*, as well as a recent decision from the Bankruptcy Court in Delaware by Chief Bankruptcy Judge Kevin J. Carey, *In re Foamex Intern.*, Case No. 09-10560 (Bankr. D. Del.) (KJC) (approving credit bid and sale of substantially all of debtors' assets over minority lenders' objection) is found in a well-written article authored by Christopher M. Winter entitled *Minority First-Lien lenders Rebuffed in Attempts to Hijack Bankruptcy Sales,* 28 Am. Bankr. J. 30 (Oct., 2009).
[xxx] *Id.* at 678.
[xxxi] *Id.* at 679.
[xxxii] 2009 WL 453110 (Bankr. D. Del. Feb. 23, 2009).
[xxxiii] *Id.,* *2.
[xxxiv] *Id.,* *6.
[xxxv] *Id.*
[xxxvi] 391 B.R. 25 (BAP 9th Cir. 2008).

[xxxvii] 391 B.R. at 39.
[xxxviii] Section 363(f)(3) of the Bankruptcy Code provides that "[t]he trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estates if—(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property." 11 U.S.C. § 363(f)(3). Section 363(f)(3) of the Bankruptcy Code provides that "[t]he trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estates if—(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C. § 363(f)(5).
[xxxix] *See Clear Channel,* 391 B.R. at 32 n.6 and 39.
[xl] *Id.* at 32 n.6.
[xli] *Id.* at 35-37. Section 363(m) of the Bankruptcy Code provides that "[t]he 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).
[xlii] 407 B.R. 222, 231 (BAP 6th Cir. 2009). The Sixth Circuit BAP characterized the Ninth Circuit BAP's ruling as "an aberration in well-settled bankruptcy jurisprudence applying § 363(m) to the 'free and clear' aspect of a sale under § 363(f)." *Id.*
[xliii] *Clear Channel,* 391 B.R. at 39-41. In its decision, the BAP rejected case law standing for the proposition that "cramdown" pursuant to Bankruptcy Code section 1129(b)(2) is a "qualifying legal or equitable proceeding" contemplated by Code section 363(f)(5) as applying "circular reasoning," that is, these cases "sanction[] the effect of cramdown without requiring any of § 1129(b)'s substantive and procedural protections." *Id.* at 46.
[xliv] Jo Ann J. Brighton and Felton E. Parrish, *Two Recent Decisions Show That § 363 Sales Are Not Dead in the Ninth Circuit*, 28 Am. Bankr. Inst. J. 42, 43 (July/Aug. 2009), citing *In re Wrangell Seafoods*, Case No. 09-00012 (Bankr. D. Alaska Mar. 9, 2009) (Docket No. 116) (unpublished; "Sale Order") and *In re Jolan*, 403 B.R. 866 (Bankr. W.D. Wash. 2009).
[xlv] Recent Decisions at 42.
[xlvi] Id. at 43 (quoting *Wrangell*, Sale Order at 2-3).
[xlvii] 403 B.R. at 866-67.
[xlviii] *Id.* at 868.

[xlix] *Id.* at 869.
[l] *Id.*
[li] *Id.* at 869-70.
[lii] *Id.* at 870.
[liii] 407 B.R. 463 (Bankr. S.D.N.Y. 2009).
[liv] 407 B.R. at 486-95.
[lv] *Id.* at 487-90. The full citation to the Supreme Court's decision in *Piccadilly* is ___ U.S. ___, 128 S. Ct. 2326, 171 L.Ed.2d 203 (2008).
[lvi] 407 B.R. at 497-98.
[lvii] 700 F.2d 935 (5th Cir. 1983).
[lviii] 700 F.2d at 940.
[lix] 407 B.R. at 495-96.
[lx] *Id.* at 499-506.
[lxi] *Id.* at 500.
[lxii] *Id.* at 505.