Bankruptcy Sales Free and Clear of Liens

The trustee or DIP may sell real property pursuant to 11 USC 363 (b) (sales other than in the ordinary course of business), or pursuant to 11 USC 363 (c) (sales in the ordinary course of business), free and clear of any interest in such property of an entity other than the estate, with the liens attaching to the proceeds of sale, only if one of the five elements of 363 (f) is present. 11 USC 363 (1) provides:

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

(1) applicable non bankruptcy law permits sale of such property free and clear of such interest;
(2) such entity consents;
(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
(4) such interest is in bona fide dispute; or
(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

These five elements comprise the statutory underpinnings authorizing a sale free and clear of liens and other interests. Counsel should be aware that this broad grant of authority to sell free and clear of liens and other interests applies to federal and state tax liens as well.[i] The public policy served by this provision can be seen in affording the bankruptcy court the ability to dispose of these claims and interests in one forum, thereby providing a purchaser of the asset the avenue to purchase free of such liens and other interests. This ostensibly provides a purchaser with incentive to pay more for the asset, now free of claims and interests, which results in the additional consideration flowing to the benefit of the estate and its claimants, and maximizing the return on the asset. This policy objective must be balanced with the bankruptcy requisites of adequate protection and adequate disclosure, as well as the bankruptcy axiom, "liens ride through."

With the policy concepts in mind, a closer review of the five elements is in

order.

Sale under applicable non bankruptcy law, 363(f)(1), authorizes sale free of liens and interest when applicable non bankruptcy law permits it. This provision is rarely if ever used in a real property asset sale; I am aware of no state law provisions permitting such authorization, since it would mean that a seller of real property could simply sell free of such interests (mortgages, judgments, etc.). It is employed in the personal property arena under the Uniform Commercial Code. The code authorizes the sale of inventory in the ordinary course of business free and clear of security interests.[ii] In the event counsel or underwriters encounter a real property sale authorization pursuant to 363(f)(1), home office counsel should be contacted in order to carefully review the state or other law provision ostensibly relied upon. Again, this is highly unlikely in a real estate transaction.

Sale with consent of lien holders (entities), under 363(f)(2), authorizes a sale free of liens and interests when the holder of the lien or interest consents to the sale. The consent contemplated here is the consent to the sale of the asset free and clear of liens and interests, and not merely consent to a sale of the asset. Disclosure is a watchword in bankruptcy and the party whose interest is affected must have notice that its lien is being released, or divested, with respect to the collateral being sold. The notice of sale must be clear as to this issue. Consent, leaving Stern issues aside, may be express or implied.[iii]

Section 363 (1) (3) provides, when the sale price exceeds the aggregate value of all liens on the property, the sale may be effectuated free and clear of liens, when the sale price exceeds the value of all liens on the property. This provision, consistent with the policy objective to maximize the return to the estate, appears to oblige the court to look not only to the value of the liens, but further as to whether or not there is any equity in the property. The trustee, or DIP, should not need to sell free and clear of

liens if the proceeds will simply go to the lienholders anyway. In this instance, the estate will receive no benefit from the sale.[iv]

The courts appear divided on the construction of the language, "the price at which such property is to be sold is greater than the aggregate value of all liens on such property". The split results from a divergence of opinion as to the meaning of the language "aggregate value of all liens"; some courts hold that the phrase means the value as determined by 506 (a), essentially the actual economic value of the lien.[v] The rationale derives from the fact that 506 (a) basically states, that an allowed claim of a creditor secured by a lien on property, in which the estate has an interest, is a secured claim, but only to the extent of the value of such creditor's interest in the estate's interest in such property. Courts adopting this line of reasoning construe the term value, employed in 363 (f) (3), as a term of art, which must in their analysis be consistent with 506 (a); in fact some cases hold that this result is consistent with and buttressed by the code concept of adequate protection which pervades 363 and the code itself.[vi] The term" aggregate value of all liens" means, under this analysis, the aggregate of the allowed secured claims of the secured creditors, as provided for under 506 (a), essentially reducing them to the actual economic value of the lien. Based upon this rationale, the sales price must simply exceed the economic value of the property sold to sell free and clear of liens.

This approach, in my opinion, may present a classic example of strained tautological reasoning in a situation where the property is over encumbered. A criticism I have with this approach is that from a strictly logical standpoint it would only apply where the property is under encumbered, the property has equity. This approach fails to consider the fact that the statute uses the term, "greater than." This becomes problematic with respect to over encumbered property. Many courts, in utilizing this approach with respect to a sale of property, where the

property is over encumbered (the liens exceed the value of the property - there is no equity), appear to be ignoring the fact that that they are permitting a sale for a price where the economic value of the liens is the same as the sale price, not greater. Under 506 (a), the secured creditor only has an allowed secured claim to the extent of the creditor's interest, in the estate's interest, in the property. But the economic value of the property, its fair market value, is always determined by what a willing buyer will pay and what a willing seller will offer. The sale price in a 363 (0 proceeding to sell over encumbered property can never be greater than the aggregate economic value of the liens on the property, under this methodology. From a logical standpoint, it would always be the same — the sales price, in the instance of over encumbered property, would be the same as the economic value of all of the liens.

Logic aside, some courts have permitted sales of over encumbered property where the sales price (using strained logic) somehow (?) exceeds the economic value of the property. Other courts, utilizing this approach, sometimes show a modicum of intellectual honesty, and bluntly just permit it; they require only that it be, in their estimation, the best price obtainable under the circumstances of the sale, and in addition require an additional finding of some form of special circumstances to further justify the sale (e.g., rapidly depreciating property values in the market).[vii] They often advert to the need to preserve the value of the collateral. Many courts (usually in a Chapter 11 proceeding, utilizing a pre confirmation 363 (f) sale) have used this approach to sell free and clear of the property rights of junior lienholders whose non bankruptcy liens are not supported by the collateral's value.[viii] That is, there may be a sale free and clear of "out-of-the-money" liens. This 'rough house' approach toward secured creditors is less likely, but not unknown, in a Chapter 7 proceeding, since there the Trustee or Dip is often more inclined to abandon over encumbered property. Again, I find this reasoning, to justify a sale free and clear of

liens, somewhat intellectually disingenuous.

The other line of cases, interpreting "aggregate value of all liens", has held that the sales price must exceed the face amount of all liens, a literal interpretation.[ix] This line of reasoning is buttressed by the legislative history.[x] Under this analysis, face amount would be the amount owed to the lien holder, the amount of his full claim (secured and unsecured), not his allowed bifurcated secured claim under 506 (a). This construction is consistent with the literal language of the provision itself and appears to me to be the better reasoned analysis. The language of (f) (3) uses the term "value of all liens" and not the term "value of all claims" which would, if the latter were employed, have been a much more direct reference to valuation as provided for under 506 (a); since, 506 (a) determines the value of claims and not liens. Clearly, the Congress apprehended this distinction in terminology; nonetheless, they used the term "value of all liens." Under principles of statutory construction, where statutory language is plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result. This lends credence to the branch of cases which hold that the use of the term lien in the statute should be construed to mean the face amount of the lien, i.e., the amount owed to the lien holder. If this were not the case, 363(f)(3) would appear to authorize a sale free and clear of any lien irrespective of whether the lienholder held an allowed claim, which does not appear to be something which Congress intended in the drafting.[xi]

That being said, the construction providing for determining the valuation of liens consistent with 506 (a) - to wit, their economic value - appears to be prevailing in current practice, especially in Chapter 11 cases. In these cases, often due to the practical realities of selling a business as a going concern (in order to maximize the return to the estate), sales have been effectuated free and clear of liens, even secured

liens on over encumbered property (the economic value of the liens is less than [using perverse logic], or equal to the sale price of the property). These sales have been effectuated in deference to the pragmatic necessity of getting the business sold at the best price. For our purposes, one needs to be cognizant of the utilized construction, for determining value of liens, in the venue where the court sits; nonetheless, a final non appealable order, irrespective of valuation method chosen, should stand, since it is unlikely that it is jurisdictional in nature -again, Stern concerns aside.

363(f)(4), provides for sale free and clear of liens and interests when such interest is in bona fide dispute. Generally, the burden of proof to prove bona fide dispute rests with the trustee, or DIP[xii]; nonetheless a third party may raise the issue of bona fide dispute and prove its case. The burden is met when either a factual or legal basis is proffered which objectively challenges the validity of the interest disputed. The bankruptcy court need only make a determination that a bona fide dispute exists; it is not required to resolve the dispute in order to authorize a sale under 363 (f)(4).[xiii]

363(f)(5), provides for sales free and clear of liens and interests when such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. This provision requires that there be a real, not hypothetical, legal or equitable proceeding available, where the entity could be compelled, under an existing law, to accept a money satisfaction for its interest. In such a proceeding, the interest would be replaced by cash collateral, or other adequate protection. Non bankruptcy law may, in some instances and jurisdictions, permit the monetary satisfaction of a lien, when the lien holder is paid in full out of the proceeds of sale. But the real question is the ability to sell when the lien holder is not paid in full; the property is being sold for less than the value of the lien. Can the lien holder be made to accept an amount from

the proceeds of sale which is less than the value of its lien? Under the Uniform Commercial Code, when collateral is sold to a buyer in the ordinary course of business, the security holder's security interest may be limited to the proceeds on the sale of the collateral.[xiv] In this instance, 363(f)(5) would seem to apply, although it would overlap with 363(f)(1). However, this Uniform Commercial Code provision does not apply in the event of a sale out of the ordinary course of business; in that event, the security interest continues in the collateral purchased by the purchaser — here 363(f)(5) would be of no avail. This approach is unlikely to be of use in a real property context since liens continue as security interests in the hands of a purchaser. I am not aware of any state statutes requiring the holders of real property interests or liens to accept a money satisfaction of their interests, especially when they are not paid in full.

Some cases have suggested that cram down in a chapter 11 case, or interests subject to valuation and distribution in a chapter 7 case, could be construed as interests which could be compelled to accept a money satisfaction.[xv] The logic here is circuitous, since it would require reliance on the bankruptcy code itself to obtain the result, and 363(f)(5) seems to require a legal or equitable proceeding outside of itself, i.e., a non-bankruptcy statute and proceeding. Why would one need 363(f)(5), if one could simply use another bankruptcy code provision? With respect to chapter 11 cram down, to utilize cram down, under 363(f)(5), would sanction the effect of cram down without requiring any of § 1129(b)'s substantive and procedural protections — this would not be an acceptable use. The Ninth Circuit BAP has cogently rejected this line of reasoning in Clear Channel Outdoor, Inc. v. Knupfer[xvi] In addition, the Clear Chanel Court recognized the need to read 363 (f) so that all parts of the statute worked harmoniously together. This follows the legal maxim of construction, "all parts of a statute should be considered together." Thus, to construe 363(f)(5) as applying to any situations where a secured lien

could be paid with money would effectively nullify any limitations on sales free and clear of liens as contained in 363(f)(3), the court held,

> "Put another way, any interpretation of paragraph (5) must satisfy the requirement that the various paragraphs of subsection (f) work harmoniously and with little overlap. The bankruptcy court's broad interpretation does not do this. Initially, if the Trustee's and DB's interpretation were accepted, paragraph (5) would swallow and render superfluous paragraph (3), a provision directed specifically at liens. The specific provisions of paragraph (3) would never need to be used, since all liens would be covered, regardless of any negative or positive relationship between the value of a creditor's collateral and the amount of its claim. A result that makes one of five paragraphs redundant should be avoided."

Indeed, virtually all liens are amenable to satisfaction with the payment of money. To construe 363(f)(5) as applying to these situations would virtually obviate the need for the other elements of 363 (f), (f) (1) through (f)(4); (f)(5) would effectively `swallow' them all. Such a construction would appear to be at odds with the general principles of statutory construction. The Ninth Circuit BAP, in Clear Channel, flatly rejected as too simplistic, any interpretation that construed 363(f)(5) to mean that it applied to any circumstance where the lien or interest holder can be paid with money. They held,

> "We do not think that § 363(f)(5) is so simply analyzed. Although it is tautological that liens securing payment obligations can be satisfied by paying the money owed, it does not necessarily follow that such liens can be satisfied by paying any sum, however large or small. We assume 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. See In re Gulf States Steel, Inc. of Ala., 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002)... 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."

In order for this provision to apply, one would need a non-bankruptcy law, which would compel the holder of a real property lien, or interest, in a legal or equitable proceeding, to accept a money satisfaction for less than its lien.[xvii] I am aware of no such provisions. In the event this provision is relied upon, home office counsel should be consulted. It should have little application to real property liens or interests.[xviii]

It is interesting to note that 363 (f) is written in the disjunctive, meaning the sale free and clear of liens may be effectuated if any one of the elements of 363 (f) has been met. Does this disjunctive format mean that you cannot mix and match the five elements? Use two or more elements in combination to achieve a result that one could not obtain with the use of only one element. The statute does not affirmatively preclude it and most courts have permitted it. Old Republic, as well as other title insurers, has gone along with this approach, provided the circumstances are right, and that the sale was effectuated usually by a final non appealable order, on clear notice.

Some examples of what I mean by mix and match may be instructive here - for example, a sale free and clear of a first mortgage, when the sale proceeds are sufficient to pay off the first mortgage lien, and where the second mortgagee consents to the sale, although the proceeds will not fully pay off the second mortgagee's lien. Another example is where a trustee negotiates a settlement with one lien holder, to take less than the full value of his lien, and the amount of the lien, as settled, is used, in computing the aggregate value of all liens under the (f) (3) calculation (see In re Van Metre, Inc. 155 B.R.118 (Bankr. E.D. Va. 1993)). Arguably, when this is accomplished pursuant to a final order of sale without appeal, the issue, if any, is waived and not jurisdictional, leaving any Stern issues aside here. The garden variety sales under 363 (0 occur when the sale price exceeds the face value of all the liens on the property, or the entities with interests in the property, for example, all secured creditors, consent to the sale. When

employing mix and match scenarios it is advisable to consult senior title counsel.

Clearly, in any sale free and clear of liens, you need to examine carefully the elements which I reviewed earlier in connection with sales in or out of the ordinary course of business. In addition, you will want to be certain that all the secured parties listed in the title report have been served with the notice of motion for sale. The notice should be clear and indicate that a sale will be made free and clear of liens — adequate disclosure. Have secured creditors filed notices of claim and to what extent have they participated in the proceedings? Unsecured creditors are also entitled to notice and have a right to object to the sale for cause. Make absolutely certain that the estate has title and that title is not in dispute.

Any sale pursuant to 11 USC 363 (f) is subject to the adequate protection requirements of 11 USC 361. Adequate assurances, adequate protection, and adequate disclosure, these are the watchwords in bankruptcy. The lien creditor must be given something to replace the lien he is losing. Courts usually have deemed that adequate protection is met when the liens are by court order made to attach to the proceeds of sale subject to further disposition by the court. In a section 363 sale, the real estate collateral is replaced by cash collateral - the proceeds of sale.

When a transaction involves a sale free and clear of liens, we will usually insist on a final non-appealable order of sale; we will generally not insure a sale free and clear of liens in the absence of a final non appealable order of court. We generally require an order even though the code contemplates sales free and clear of liens without orders of court in certain circumstances. In fact, as discussed earlier, section 363 (c) sales in the ordinary course of business can be effectuated without notice, hearing, and a court order; even section 363 (b) sales can be accomplished administratively without a hearing and a court order if no noticed creditors object. Nonetheless, due to the high risk in these matters, especially in light

of the Stern case, we will usually insist on an order. Counsel must satisfy themselves that all interested parties were served with proper notice and disclosure of the sale, and that a final non-appealable order of sale was entered, which order should provide that the sale is being made free and clear of all liens, with the liens attaching to the proceeds of sale, subject to further disposition of the court. The conveyance will usually recite that it is being made free and clear of all liens pursuant to an order of sale, reciting the court and venue. We usually require that this order be recorded in the land records, which will necessitate the need of a certified copy of the order.

One final comment concerning sales free and clear of liens, we never omit open real estate taxes and assessments, even where the order provides for sale free and clear of all liens, unless the taxes and assessments are paid in full at closing. This comment applies to sales free and clear of liens pursuant to a confirmed Chapter 11 Plan, as well. Many municipalities refuse to remove the taxes from the tax rolls even in the face of an order. This presents a major pragmatic problem and no title company wishes to be placed in the position where it needs to retain counsel to have the taxes removed — the duty of defense, costs of defense can exceed policy amounts.

IV Sales of Property of the Debtor, Free and Clear of Liens, pursuant to a Chapter 11 Confirmed Plan

For purposes of this discussion, we shall assume that counsel has reviewed the chapter 11 proceeding, the plan, its contents, etc. We shall limit this discussion to a plan properly confirmed pursuant to 11 USC 1129, which enumerates the requirements for the court to confirm a chapter 11 plan.

In order to understand the ability to sell property of the debtor, dealt with by the plan, free and clear of any liens, one must first understand what the effect of a confirmation of a chapter 11 plan is.

The governing provision here is 11 USC 1141. This section describes

the effects of a plan confirmed by order of the court. Section 1141 (a) states that the provisions of a confirmed plan bind the debtor, any entity issuing or acquiring property under the plan, and any creditor of or equity security holder or general partner in, the debtor. Subdivision (b) states - except as may be otherwise provided in the plan or in the order confirming the plan - confirmation of a plan vests all property of the estate in the debtor. This is important; the property is no longer property of the estate, but now is property of the debtor. Again, as I mentioned with respect to Section 363, you must determine that title is properly vested in the debtor; if it isn't, the sale should not go through.

Subdivision (c) provides - except as provided for in subsections (d) (2) and (d) (3) of section 1141, and except as otherwise provided for in the plan or the order confirming the plan - property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders and general partners. It is if you will a default provision, in the event the plan or order are silent as to such claims or interests.

Section 1141 (c) may also be interpreted as providing for an *in rem* discharge of property of the debtor that effectively parallels the *in personam* discharge provided for in 1141 (d). This provides insight into the meaning of the phrase in 1141 (c), "...except as provided for in subsections (d) (2) and (d) (3)..." The *in rem* discharge of property dealt with by the plan from all claims and interests of creditors, is excepted from discharge, where the debtor would be excepted from discharge personally. Section (d) (2), excepts the in rem discharge of liens, for an individual debtor, where the debts of the debtor, would be excepted from discharge under 11 USC 523. Section (d) (3) deals with a discharge in a liquidating Chapter 11 case, here a non-individual debtor, a partnership or corporation is not entitled to an *in rem* discharge of the property dealt with by the plan, if its plan provides for liquidation of all or substantially all of its assets, and the debtor does not thereafter continue in business; this is because, 11 USC 727 (a) (1)

denies a discharge, in a chapter 7 case, where the debtor is not an individual. That is not to say that the plan or order confirming the plan may not otherwise explicitly provide for a sale of real property free and clear.[xix]

Section (d) is the provision which generally provides for the discharge of debts that arose before the plan confirmation, as well as termination of the rights of equity security holders and of partners who are provided for under the plan. The discharges and terminations are subject to the section 523 exceptions to discharge in the case of an individual, and to the section 727 exceptions to discharge in the case of a liquidating plan by a non-individual debtor.

The effect of the entry of an order of confirmation, except as otherwise provided for in the plan or the order, is that upon entry of the order pursuant to 11 USC 1141 (b), it vests title to property of the estate into the debtor. Section 11 USC 363 authorizes only transactions with respect to property of the estate. Therefore we need to look to 11 USC 1141 (c), which states the general rule - subject to the provisions of 11 USC 1141 (d) (2) and (d) (3), and of course the order or any contrary provisions in the plan - property dealt with by the plan, is transferred or retained by the debtor free and clear of all claims or other interests of creditors.

Claim, lien, judgment lien, are all defined terms under 11 USC 101, and as such are all subsumed and included under the general rule enunciated in 1141 (c) — " free and clear of all claims or other interests of creditors." This would include federal and state tax liens.[xx]

Now, in order for property to be freed of claims and interests, the property must be dealt with by the plan. If the plan fails to schedule, or mention, or to provide for a particular property, that property will not be freed of claims and interests pursuant to section 1141 (c). Conversely, should the plan, or the order, provide for the vesting of the property in the debtor, or for the transfer of the property to a third party subject to the lien, then the lien will not be extinguished, the terms of the plan or order

will control. The orders, the plan, and any amendments must be examined carefully.

Section 1141 (c) is interpreted by many as the provision that permits a plan to extinguish, or divest, liens on or other interests in property. It is essentially a default provision. Nonetheless, this default provision is in conflict with another stated principle in bankruptcy, to wit: liens pass through bankruptcy unaffected - they do of course, unless brought into the bankruptcy and properly dealt with and extinguished in the proceeding.

Due to this conflict, several appellate courts have engrafted an additional judicial requisite into 1141 (c), they mandate that in order for a lien to be extinguished, not only must the property be dealt with by the plan, but the creditor whose interest is to be extinguished, must also have " participated in the proceedings." The court in the Seventh Circuit Penrod decision[xxi], framed the issue as, "we must decide whether preexisting liens survive a reorganization when the plan (or the order confirming it) does not mention the liens. What in other words is the default rule when the plan is silent?" The court in Penrod held that for a secured creditor who files a notice of claim, for which provision is made for in the plan, the default rule would apply. Therefore, in the event of silence, the lien would be extinguished, unless the plan or order provided for its continuance. That would not be the case if no proof of claim were filed, or there were no other meaningful participation by the secured creditor, as well as no provision made for the secured creditor, in the proceeding.

We as a general principle do not rely on the default provision; we usually require that the order or plan explicitly contain a clear provision providing for the extinguishment of the lien. This, in addition, provides notice to a secured creditor that its lien will not survive, and gives them an opportunity to object; remember, adequate disclosure. Again, due to Stern concerns, we always want to be sure that a secured creditor was give notice of the proceeding and an opportunity to object. It is helpful if secured

creditors filed notices of claim, although mere failure to file does not void their secured status, 11 USC 506 (d). To what extent can we confirm they participated in the proceedings? We, in addition, will usually always want a final non appealable order of confirmation. Here again, the plan, any amendments, along with the order of confirmation, or supplemental orders must be examined to determine that the liens are properly released. A copy of the order of confirmation, especially where providing for sale free and clear of liens and interests, should be recorded in the land records, along with the deed. The deed should contain adequate recitals, especially if the property is being conveyed free and clear of liens, along with the recitals of the court, venue, and order under which it is being delivered.

[i] Section 363 (f) provides, in pertinent part, as follows, "(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate".

Entity is a broader term than person, it includes governmental entities, it is defined as follows:

"101 (15) The term "entity" includes person, estate, trust, governmental unit, and United States trustee."

Governmental unit in turn is defined under the code to mean:

"(27) The term **"governmental unit" means United States; State**; Commonwealth; District; Territory; **municipality;** foreign state; **department, agency, or instrumentality of the United States** (but not a United States trustee while serving as a trustee in a case under this title), **a State, a Commonwealth, a District, a Territory, a municipality**, or a foreign state; or other foreign or domestic government."

It is interesting to note that section 106 provides for the waiver of sovereign immunity, as to a governmental unit, as follows:

"§ 106. Waiver of sovereign immunity
(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections **105**, 106, 107, 108, 303, 346, 362, **363**, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, **1146**, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title [11 USCS §§ 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327]."

In addition see, USA v. Booth Tow Services, Inc., 64 B.R. 539 (USDC,WD Missouri, 1985).

[ii] U.C.C. Section 9-320 (a purchaser in the ordinary course takes free of security interests).

[iii] See, FutureSource LLC v. Reuters Ltd., 312 F.3d 281 (7th Cir. 2002) , cert.

denied, 538 U.S. 962, 123 S. Ct. 1769, 155 L. Ed. 2d 513 (2003) (consent implied from failure to object, provided there was adequate notice); Veltman v. Whetzal, 93 F.3d 517 (8th Cir. 1996) (failure to object to proposed sale, coupled with stipulation on authorizing sale free of interest, constituted consent); Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343 (E.D. Pa. 1988) (implied consent found); Hargrave v. Pemberton (In re Tabore, Inc.), 32 C.B.C.2d 1239, 175 B.R. 855 (Bankr. D.N.J. 1994) (failure to object to notice of sale or attend hearing deemed consent to sale for purposes of section 363); In re Shary, 152 B.R. 724 (Bankr. N.D. Ohio 1993) (state's failure to object to transfer of liquor license constituted consent to sale); but see, Contra In re Roberts, 249 B.R. 152 (Bankr. W.D. Mich. 2000), (court held that the consent required by 11 U.S.C.S. § 363(f)(2) could not be implied from the lienholder's failure to object to a trustee's motion to sell property of the estate free and clear of a lien. Consent and failure to object were not synonymous.).

[iv] See, In re Riverside Inv. Partnership, 674 F.2d 634 (7th Cir., March 1982), (As a general rule, the bankruptcy court should not order property sold "free and clear of" liens unless the court is satisfied that the sale proceeds will fully compensate secured lienholders and produce some equity for the benefit of the bankrupt's estate. See Freeman Furniture Factories, Inc. v. Bowlds, 136 F.2d 136, 140 (6th Cir. 1943); Hoehn v. McIntosh, 110 F.2d 199, 202 (6th Cir. 1940); In re Unikraft Homes of Virginia, Inc., 370 F. Supp. 667, 670-71 (W.D.Va.1974); In re Bernhard Altmann International Corp., 226 F. Supp. 201, 205-06 (S.D.N.Y.1963). Cf. Standard Brass Corp. v. Farmers National Bank, 388 F.2d 86, 89 (7th Cir. 1967) (trustees abused discretion by selling property free of lien when sale returned no equity to bankrupt's estate).).

[v] See, In re Beker Indus., Inc., 15 C.B.C.2d 52, 56-57, 63 B.R. 474, 477 (Bankr. S.D.N.Y. 1986) ; see also In re Collins, 180 B.R. 447, 450-01 (Bankr. E.D. Va. 1995) ; In re WPRV-TV, Inc., 143 B.R. 315, 320 (D.P.R. 1991) ; In re Milford Group, Inc., 150 B.R. 904, 906 (Bankr. E.D. Pa. 1992) ; In re Oneida Lake Dev., Inc., 23 C.B.C.2d 143, 114 B.R. 352 (Bankr. N.D.N.Y. 1990) ; In re Terrace Gardens Park P'ship, 20 C.B.C.2d 1183, 96 B.R. 707 (Bankr. W.D. Tex. 1989).

[vi] See, In re Terrace Gardens Park Partnership, 96 B.R. 707, (The court here essentially followed the line of reasoning that the requirement that the sale price exceeds the aggregate value of all liens simply requires that a sale price need only exceed the value of the property, relying on the definition of a secured claim in Section 506(a), which equates such a claim to the value of the collateral securing the claim. In re Beker Industries Corp., 63 Bankr. 474 (Bankr. S.D.N.Y. 1986), The court in Terrace used the adequate protection mandate to buttress this approach- ("Sections 361-364 all address the treatment of secured claims in a bankruptcy case. All four sections employ the common concept of adequate protection as the touchstone for whether a

debtor's proposed action should be approved. Adequate protection in turn focuses on the value of the collateral securing the claim. So long as a creditor's interest is adequately protected, the debtor is permitted to sell property of the estate. 11 U.S.C. § 363(e). It makes no sense to read into Section 363(f)(3) a restriction inconsistent with the adequate protection scheme which pervades both Section 363 and the rest of the Code, just because the sale is free of liens, especially as the commonly accepted method for adequately protecting a secured creditor when a sale is authorized under Section 363(f) is to order the liens to attach to the proceeds of the sale.")

[vii] See, In re Oneida Lake Dev., Inc., 114 B.R. 352, (Bankr. N.D.N.Y. 1990), (the Court must conclude that the proposed sale price is the best price obtainable under the circumstances, id. citing In re Hatfield Homes, Inc., 30 Bankr. 353, 355 (Bankr. E.D.Pa. 1983) and further that it must find special circumstances justifying the sale for less than the amount of liens over the objection of a secured creditor, id. citing In re Bernhard Altmann International Corp., 226 F. Supp. 201, 205-07 (S.D.N.Y. 1963); In re Collins, 180 B.R. 447, 450-01 (Bankr. E.D. Va. 1995).

[viii] See, In re Terrace Gardens Park P'ship, 96 B.R. 707 (Bankr. W.D. Tex. 1989); In re Oneida Lake Dev., Inc., 114 B.R. 352 (Bankr. N.D.N.Y. 1990); Milford Group, Inc. v. Concrete Step Units, Inc. (In re Milford Group, Inc.), 150 B.R. 904, 906 (Bankr. M.D. Pa. 1992); In re Collins, 180 B.R. 447, 450-01 (Bankr. E.D. Va. 1995)

[ix] See Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25 (B.A.P. 9th Cir. 2008),(" § 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.") ; Criimi Mae Servs. Ltd. P'ship v. WDH Howell, LLC (In re WDH Howell, LLC), 298 B.R. 527 (D.N.J. 2003), (The court in an excellent discussion followed the "rule that "the bankruptcy court should not order property sold free and clear of liens unless the court is satisfied that the sale proceeds will fully compensate secured lienholders and produce some equity for the benefit of the bankrupt's estate."); Scherer v. Federal Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.), 159 B.R. 821 (N.D. Ill. 1993) ; In re Perroncello, 31 C.B.C.2d 781, 170 B.R. 189 (Bankr. D. Mass. 1994) ; see also In re Healthco Int'l, Inc., 32 C.B.C.2d 476, 174 B.R. 174 (Bankr. D. Mass. 1994) ; George W. Kuney, Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process, 76 Am. Bankr. L.J. 235 (2002) Matter of Stroud Wholesale, Inc., 47 Bankr. 999 (E.D.N.C. 1985), aff'd sub nom., Richardson v. Pitt County, No. 85-1422 (4th Cir. Jan. 21, 1986); In re Red Oak Farms, Inc., 36 Bankr. 856 (Bankr. W.D.Mo. 1984); In re Bobroff, 40 Bankr. 526 (Bankr. E.D.Pa. 1984); In re Murphy, 34 Bankr 78

(Bankr. D.Md. 1983); Matter of Riverside Investment Partnership, 674 F.2d 634 (7th Cir. 1982).

[x] See, H.R. Rep. No. 595, 95th Cong., 1st Sess. 345 (1977), reprinted in App. Pt. 4(d)(i) infra; S. Rep. No. 989, 95th Cong., 2d Sess. 56 (1978), reprinted in App. Pt. 4(e)(i) infra.

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

[xii] See Scherer v. Federal Nat'l Mortgage Ass'n (In re Terrace Chalet Apartments, Ltd.), 159 B.R. 821, 828 (N.D. Ill. 1993) (citing Octagon Roofing, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991)), ("A trustee can sell estate property free and clear of a lien if the lien is in bona fide dispute. The trustee has the burden of establishing the existence of a bona fide dispute.").

[xiii] See, In re Octagon Roofing, 123 B.R. 583, ("The term "bona fide dispute" is not defined in § 363(f)(4) of the Code. However, the term "bona fide dispute" is also used in the Bankruptcy Code at 11 U.S.C. § 303 in connection with the nature of claims asserted as basis for an involuntary Chapter 7 petition. To determine in this Circuit what constitutes a bona fide dispute, "the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt." In re Busick, 831 F.2d 745, 750 (7th Cir. 1987). Under this standard, a court need not determine the probable outcome of the dispute, but merely whether one exists. Id. No authority has been cited showing that "bona fide dispute" has any different meaning when used in 11 U.S.C. § 363(f)(4), and the parties each agreed before this Court that the foregoing standard applies here. That standard has been met by the evidence presented. This Court rejects cases from other jurisdictions cited by Trustee that implied or found that merely alleging a dispute is enough to meet the burden under 11 U.S.C. § 363(f)(4). The standard in Busick requires, at least in this Circuit, some factual grounds to show that there is "an objective basis" for the dispute. In the context presented here, that standard requires evidence, and such evidence was presented.); See also, In re Collins, 180 B.R. 447, ("The Court is also called upon to interpret the phrase "bona fide dispute" in § 363(f)(4) which is undefined in the Code... The standard adopted by the Seventh Circuit Court of Appeals states that courts must determine "whether there is an objective basis for either a factual or legal dispute as to the validity of the debt." In re Octagon Roofing, 123 Bankr. 583, 590 (Bankr. N.D.Ill. 1991) (citing In re Busick, 831 F.2d 745, 750 (7th Cir. 1987)). Clearly this standard does not require the Court to resolve the underlying dispute, just determine its existence. Courts utilizing this definition have held the parties to an

evidentiary standard: evidence must be provided to show factual grounds that there is an "objective basis" for the dispute.)

[xiv] See, U.C.C. §§ 9-320 (buyer in ordinary course of business takes free of security interest); 9-315(a)(2) (security interest attaches to proceeds of collateral).

[xv] See, e.g., In re Gulf States Steel, 285 B.R. at 508; In re Grand Slam USA, Inc., 178 B.R. 460, 462 (E.D. Mich. 1995); In re Healthco, 174 B.R. at 176; In re Terrace Chalet Apts., 159 B.R. at 829.

[xvi] See note xxvii, infra.

[xvii] For an excellent discussion of 363 (f) (5) see, Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25 (B.A.P. 9th Cir. 2008).

[xviii] That is not to say that there is never a fact pattern where 363 (f) (5) would not apply, its application while limited would appear to apply to fact patterns as follows, one might be a buy-out arrangement among partners, in which the controlling partnership agreement provides for a valuation procedure that yields something less than market value of the interest being bought out. See, e.g. , De Anza Enters. v. Johnson, 104 Cal. App. 4th 1307, 128 Cal. Rptr. 2d 749 (Cal. Ct. App. 2002) (joint venturer may compel specific performance of buyout of other venturer's interest pursuant to joint venture agreement); Oliker v. Gershunoff, 195 Cal. App. 3d 1288, 241 Cal. Rptr. 415 (Cal. App. 2d Dist. 1987) (statute provided that partnership could compel buyout of withdrawing partner for a fair price to be determined by several factors). Another might be 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. See, e.g., O'Shield v. Lakeside Bank, 335 Ill. App. 3d 834, 781 N.E.2d 1114, 269 Ill. Dec. 924 (Ill. App. Ct. 2002). Yet 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. S. Motor Co. v. Carter-Pritchett-Hodges, Inc. (In re MMH Automotive Group, LLC), 2008 Bankr. LEXIS 812, 2008 WL 725102 (Bankr. S.D. Fla., Mar. 17, 2008). In these cases, a court could arguably compel the holders of the interest to take less than what their interest is worth.

[xix] Stern issues aside, see, 11USC 105, in excerpted part, § 105. Power of court "(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any

determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process…"

[xx] 11 USC 101(10) (A) provides that "the term "creditor" means-- (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;"
Entity is a broader term than person, it includes governmental entities, it is defined as follows:

"101 (15) The term "entity" includes person, estate, trust, governmental unit, and United States trustee."

Governmental unit in turn is defined under the code to mean:

"(27) The term "governmental unit" means **United States; State**; Commonwealth; District; Territory; **municipality**; foreign state; **department, agency, or instrumentality of the United States** (but not a United States trustee while serving as a trustee in a case under this title**), a State, a Commonwealth, a District, a Territory, a municipality**, or a foreign state; or other foreign or domestic government."

It is interesting to note that section 106 provides for the waiver of sovereign immunity, as to a governmental unit, as follow:

"§ 106. Waiver of sovereign immunity
(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title [11 USCS §§ 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327]."

In addition see, USA v. Booth Tow Services, Inc., 64 B.R. 539 (USDC,WD Missouri, 1985).

[xxi] In the Matter of Penrod, 50 F. 3d 459 (7th Cir., March, 22, 1995), see also, In re Be-Mac Transport Co., 83 F.3d 1020 (8th Cir. 1996) The court citing the

premise that liens ride through bankruptcy unaffected, stated, "where a plan does not expressly preserve a lien, a lienholder may lose it after confirmation of the plan, provided that the lien holder participated in the reorganization and its property was dealt with by the plan."