

**SECTION 363 AND THE PATH TO WORLD
DOMINATION;**

**CAN ALL BE ACHIEVED IN THE SALE
MOTION?**

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SECTION 363 AND THE PATH TO WORLD DOMINATION;

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I. INTRODUCTION

While Chapter 11 generally focuses on the reorganization and ongoing operations of a debtor's business, the debtor's restructuring may be accomplished by any number of means, including the sale of all or part of the debtor's assets pursuant to a liquidating or reorganizing plan of reorganization, a sale outside of a plan under § 363¹, or some combination of the two.

These materials discuss the statutory and judicially established framework for sales under § 363; advanced issues relating to such sales (including discussion of a few "pushing the envelope" strategies); and a comparison of sales through § 363 to plan sales.

II. SALES UNDER SECTION 363

A. INTRODUCTION

Section 363 of the Bankruptcy Code permits the trustee or debtor in possession to use, sell or lease all or part of the property of the estate. The sale may be "in" or "outside" of the ordinary course of business. Burlington Northern Railroad Co. v. Dant and Russell, 853 F.2d 700 (9th Cir. 1988) (delineating ordinary course of business transactions); In re Roth American, Inc., 975 F.2d 949 (3d Cir. 1992) (applying horizontal and vertical dimensions test in determining "ordinary course of business"). In the latter case, notice and hearing must precede the sale. In re Performance Materials, Inc., 309 B.R. 819 (Bankr. M.D. Fla. 2004) (sale not in the ordinary course of business requires court approval).

¹ Sales of assets in the ordinary course of business, such as the sale of finished goods to a customer, do not require specific court approval or notice to creditors. (11 U.S.C. 363 (b) (1)). This topic is limited to sales outside of the ordinary course of business.

Assets may be sold free and clear of competing interests in the property, subject to the duty to provide “adequate protection” upon the request of any party with such an interest. 11 U.S.C. 363 (e).

B. STATUTORY FRAMEWORK

Pursuant to § 363(b)(1), the debtor, “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” Such a sale of estate assets is free and clear of non-estate interests if one of the conditions dictated by § 363(f)(1) is met. See, e.g., In re Beery, 295 B.R. 385 (Bankr. D.N.M. 2003) (denying trustee’s request to sell property free and clear where record did not contain evidence that any of the provisions in § 363(f) had been satisfied). Although not specifically defined in the Bankruptcy Code, some courts have defined “interest” to “comprehend all forms of real and personal property, including profits and proceeds.” Russello v. United States, 464 U.S. 16, 21, 104 S.Ct. 292, 299 (1983); Precision Industries, Inc. v. Qualtech Steel SBQ, LLC (In re Qualtech Steel Corp.), 327 F.3d 537, 545 (7th Cir. 2003). The conditions of § 363(f) are:

1. “Applicable non-bankruptcy law permits sale of such property free and clear of such interests”

Generally, this requirement is limited in practice to ordinary sales of an operating entity in the business of selling such assets. It has been suggested that such cases are rare because non-bankruptcy law permitting sales free and clear of liens is equally rare. John Collen, What Do the Subsections of Section 363(f) Really Mean? A Primer on Selling Free and Clear of Interests, JOURNAL OF BANKRUPTCY LAWS AND PRACTICE Vol.6, No. 6 1997 p.568 (hereinafter Collen). Cases generally operate to restrict sales; holding that the Bankruptcy Court cannot sell free and clear where not permitted by applicable non-bankruptcy law. See, e.g., In re Fandrich, 63 B.R. 250 (Bankr. D.N.D.

1986) (sale free and clear prevented by terms of divorce decree); In re C-Power Products, Inc. 230 B.R. 800 (Bkrtcy.N.D.Tex.1998) (holding legal malpractice claim which was non-assignable pursuant to state law not subject to §363 sale); In re WBQ Partnership, (Bankr. E.D. Va. 1995) (preventing transfer assets of nursing home free and clear of claim of state medical assistance department).

2. “Such entity consents”

Clearly, the sale may be achieved by formal agreement of a consenting lien holder. In addition, if guarantors are involved, the impact of the secured creditor’s consent upon guarantors of underlying obligation should be considered. For example, a creditor may consent to a sale that will return less than the secured debt, if it believes that it will be made substantially whole by a collectible guarantor. Accordingly, guarantors should be provided adequate notice of all proceedings related to the sales procedure. On that same note, some cases provide that a secured creditor who receives notice of a sale free and clear of its lien and does not object is deemed to have given its consent to such a sale. See Seidle v. Southeast First Nat’l Bank (In re Medina’s Men’s Shop Inc.), 7 B.R. 102, 103 (Bankr. S.D. Fla. 1980); In re Shary, 152 B.R. 724, 725 (Bankr. N.D. Ohio 1993) (notice to government creditor and failure to object precluded subsequent attack on sale of liquor license); In re Gabel, 61 B.R. 661 (D.C. W.D. Ca. 1985) Running a preliminary title report and sending notices to all lien holders listed in the report will add some additional protection in ensuring notice is given to all necessary parties. If none of the other provisions of 363(f) apply, absent some form of secured creditor consent a sale may be prohibited. See Murphy v. Wadash Partnership (In re Murphy), 34 B.R. 78, 80 (Bankr. D. Md. 1983) (lack of lienholder consent precluded sale).

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”

This section does not require that the creditor receive the sale proceeds. However, a secured party may challenge a sale if the sales proceeds will not generate the “indubitable equivalent” of its lien on collateral. See 11 U.S.C. §§ 361, 363(3) and 1129(b)(2)(A)(iii). The fact that the Bankruptcy Code states the sale price must exceed the “value of all liens” creates some interpretive difficulties. Specifically, questions arise as to whether the proceeds must exceed the total debt against the property or just the actual value of the collateral. If the actual value approach is taken, an undersecured creditor is at risk of being forced to take less than its full claim.

Despite support in legislative history indicating that more than the entire debt against the property must be recovered at a sale, many courts have approved sales for less than the value of the debt. See Collen, at 571, citing In re Terrace Gardens Park Partnership, 96 B.R. 707, 713 (Bankr. W.D. Tex. 1998); In re Bygaph, Inc., 56 B.R. 596, 606 (Bankr. S.D.N.Y. 1986); In re Oneida Lake Dev., Inc., 114 B.R. 352, 357 (Bankr. N.D.N.Y. 1990); and In re Beker Indus. Corp., 63 B.R. 474, 476 (Bankr. S.D.N.Y. 1986). However, other courts have held that a sale cannot proceed “unless the sale price exceeds the amount of debt secured by the property.” See Collen, at 571, citing several cases including: Richardson v. Pitt County (In re Stroud Wholesale, Inc.), 47 B.R. 999, 1001-02 (E.D.N.C. 1985), aff’d, 983 F.2d 1057 (4th Cir. 1986); Mutual Life Ins. Co. v. Red Oak Farms, Inc. (In re Red Oak Farms, Inc.), 36 B.R. 856, 858 (Bankr. W.D. Mo. 1984); In re Bobroff, 40 B.R. 526, 528 (Bankr. E.D. Pa. 1984).

4. “Such interest is in bona fide dispute”

The term “bona fide dispute” is not defined in 11 U.S.C. § 363(f)(4). However, many courts, including the Seventh Circuit Court of Appeals, have stated 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 Busick, 831

F.2d 745, 750 (7th Cir. 1987); In re Octagon Roofing, 123 B.R. 583, 590 (Bankr. N.D. Ill.1991).

Clearly this standard does not require the court to resolve the underlying dispute, just to determine its existence. Id. Courts utilizing this definition have held the parties to an evidentiary standard and evidence must be provided to show factual grounds that there is an "objective basis" for the dispute. Id.

Moreover, courts have recognized that to qualify as a "bona fide dispute" under § 363(f)(4), the propriety of the lien does not have to be the subject of an immediate or concurrent adversary proceeding. See In re Collins, 180 B.R. 447, 452, n. 8 (Bankr. E.D. Va.1995) (citing In re Oneida Lake Dev., Inc., 114 B.R. 352, 358 (Bankr. N.D.N.Y. 1990) (stating that § 363(f)(4) is satisfied even though the debtor has not filed an adversary proceeding seeking to avoid the creditor's lien)); In re Bedford Square Assoc., L.P., 247 B.R. 140, 145 (Bankr. E.D. Pa. 2000) (stating that although the debtor has not commenced a § 544(a)(3) action, the fact that in all probability it could do so successfully is sufficient to establish that a "bona fide dispute" for purposes of § 363(f)(4) exists. Citing In re Collins, 180 B.R. at 452, n. 7; In re Octagon Roofing, 123 B.R. at 590-592; In re Oneida Lake Dev., Inc., 114 B.R. at 357-58; and In re Millerburg, 61 B.R. 125, 127-128 (Bankr.E.D.N.C.1986)).

The Trustee has the burden of demonstrating that a "bona fide dispute" exists. In re Terrace Chalet Apartments, Ltd., 159 B.R. 821, 828 (N.D. Ill. 1993); In re Octagon, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991); In re Gulf States Steel, Inc. of Alabama, 285 B.R. 497 (Bankr. N.D. Ala. 2002).

The secured creditor is entitled to some information as to why the lien is challenged so that he may defend his interests appropriately. Merely reciting this conclusion does not suffice to apprise the secured creditor of the basis for that conclusion. Nor is it immediately clear that questioning the validity of a lien rises to the standard set out in §363(f)(4), that there be a 'bona fide dispute'.

In re Taxi Takeout Holdings, Inc., 307 B.R. 525 (Bankr. E.D. Va. 2004). However, the court need not resolve the dispute in favor of the debtor or the trustee, only determine that there exists an objective factual or legal basis for the claim of dispute. Gulf State Steel, 285 B.R. at 507-08; Octagon Roofing, 123 B.R. at 590.

Predictably, the issue of “bona fide dispute” may hinge on the facts of a particular case. In In re Fillion, 181 F.3rd 859 (7th Cir. 1999), the bankruptcy court overruled an objection to a sale through a Chapter 13 plan on the basis that such sale would be appropriate pursuant to §363(f)(4). There, the Debtor’s (Bass) father deeded to her a 152 acre farm (reserving a life estate). When the Debtor, her husband and three children moved in, “Unfortunately for all concerned, the relationship between Bass and the Fillions became acrimonious almost immediately.” Id. at 861. Ultimately, Bass filed a complaint to rescind the deed, and the Debtor filed for bankruptcy protection. The court held that Bass’s claim for rescission was the subject of a “bona fide dispute” such that a sale could be approved under §363(f)(4). See In re Collins, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995) (noting that there must be “an objective basis for either a factual or legal dispute as to the validity of the debt”). In In re Eagle Pine Products, Inc., 284 B.R. 784 (Bankr. E.D.N.C. 2001), the court held that the trustee’s question as to whether documents were executed which appeared to be valid on their face did not create a bona fide dispute, but the issue as to whether the secured creditor could be required under the doctrine of marshalling to first pursue recovery from other collateral did create a bona fide dispute for purposes of §363(f)(4).

An interesting use of §363 sale powers is illustrated in McArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2nd Cir. 1988). There, the Court approved a settlement with the Debtor’s insurance companies which included an injunction against suits against the insurers by third parties. The Court

found that the Debtor's interest in the policies was sufficient for the policies to constitute property of the estate, and rejected the insurer's claims that the products liability limits had been exhausted. The Court reasoned that it therefore had the ability to sell the policies under a 363(f)(4) analysis, and extended that power to enjoin further litigation against the insurers.

It has been held that a "bona fide dispute" as to the debtor's claim of exemption does not justify sale of property under §363(f)(4), holding that nothing in that section indicates authority to sell free and clear of exemption claims. In re Clark, 266 B.R. 163, 172 (9th Cir. BAP 2001). "In other words, if the property is exempt it may not be sold by the Trustee; if it is not exempt, it may be sold. The threshold question, is it still property of the estate, must first be decided." Id.

5. "Such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest"

The phrase "money satisfaction" has been interpreted to mean cash money rather than a mere promise to pay in the future. See Gerdes v. Gerdes (In re Gerdes), 33 B.R. 860, 870 (Bankr. S.D. Ohio 1983). Reading this section broadly could lead to the conclusion that common encumbrances such as mortgages, mechanic's liens and tax liens would be released in a sale pursuant to subsection (f)(5). This interpretation would allow a sale even without full satisfaction of the liens as long as the interest is "one of those interests that, in some hypothetical proceeding, could be forced to be released if a full money satisfaction were rendered." Collen at 576, citing In re Julien Co., 117 B.R. 910, 919 (Bankr. W.D. Tenn. 1990); WBQ Partnership v. Virginia (In re WBQ Partnership), 189 B.R. 97, 107 (Bankr. E.D. Va. 1995) (addressing split in jurisdictions on requirement of hypothetical payment). Such a broad reading has been opposed because it would make the other four subsections redundant. See In

re Stroud Wholesale, 47 B.R. 999, 1002 (D.C. N.C. 1985) (finding that subsection (f)(5) should only be applied when it appears a sale will fully satisfy the encumbrances).

While it is generally true that a secured lender is only entitled to the payment of his lien and can be required to accept full payment in satisfaction of his lien, this subsection ought not be construed so broadly so as to become a sufficient basis to always permit the sale of any property subject to a security interest. Such a construction would consume subsections 2, 3 and 4. Subsection 3 envisions a secured lender being paid in full, preferably at closing, if the collateral is sold. It recognizes the bargained-for position of the secured lender and balances his right to dispose of the collateral for his benefit pursuant to the terms of the negotiated security agreement and the right of the trustee to dispose of the collateral for the benefit of all creditors of the estate pursuant to the Bankruptcy Code. If the trustee will pay the secured lender in full, the secured creditor cannot be heard to complain and the trustee may sell the collateral for the benefit of the unsecured creditors. However, if the sale of the collateral will result in a deficiency, the secured creditor generally should be able to dispose of it according to the security agreement.”

In re Taxi Takeout Holdings, Inc., 307 B.R. 525, 533 (Bankr. E.D. Va. 2004).

Taking the opposite approach and construing this section narrowly may also be problematic as it appears to make subsection (f)(5) redundant to subsection (f)(3) where liens are at issue. In an attempt to address the overlap, courts have employed other approaches--including allowance of § 363(f)(5) sales if a secured creditor’s interest could be crammed down under a plan. See Collen, at 577, citing In re Terrace Chalet Apartments, Ltd., 159 B.R. 821, 829 (N.D. Ill. 1993) (“The federal courts have espoused two interpretations of Section 363(f)(5)”).

Some courts interpret this provision as meaning that the trustee must pay the full amount of the secured party's lien, unless "equitable considerations" will justify lien extinguishment upon realization of less than the full amount of the secured debt. In re Wing, 63 B.R. 83, 85 (Bankr.M.D.Fla.1986); In re Stroud, 47 B.R. at 1002-04; In re Heine,. 141 B.R. 185, 189-190 Bankr. D. S.D. 1992).

Other courts authorize the sale and consequent lien extinguishment if the creditor could be crammed down pursuant to § 1129(b)(2). WPRV-TV, 143 B.R. 315, 321 (D. Puerto Rico 1991); In re Weyland, 63 B.R. 854, 860-61 (Bankr.E.D.Wi.1986); In re Hunt Energy Co., 48 B.R. 472, 485 (Bankr.N.D.Ohio 1985); In re Red Oak Farms, Inc., 36 B.R. 856, 858 (Bankr.W.D.Mo.1984); In re Healthco Int'l, Inc., 174 B.R. 174, 176 (Bankr. D. Mass. 1994); In re Perroncello, 170 B.R. 189, 191-92 (Bankr. D. Mass. 1994); Hunt Energy Co. v. United States (In re Hunt Energy Co.), 48 B.R. 472, 485 (Bankr. N.D. Ohio 1985); c.f. In re Red Oak Farm, 36 B.R. 859 (Bankr. Mo. 1984). Application of this theory should require that the sale proponent comply with all the procedural requirements for plan confirmation. Otherwise a lienholder could argue that its rights are being affected based upon speculation as to the outcome of plan voting that could only be ascertained if actual plan confirmation procedures were followed. See Collen at 578. Under this approach, could the creditor then “hypothetically” assert its credit bid rights to defeat the hypothetical cramdown? Could the creditor hypothetically assert its 1111(b)(2) rights?

Due to the difficulties interpreting the appropriate use of this subsection, it has been suggested that it should not be applied to liens and that it should be avoided as a justification for a § 363 sale as the unsettled nature of the case law opens the door to challenges by lienholders and creates concerns for title companies. See Collen at 579.

C. WHEN SECTION 363 (b) SALES ARE APPROPRIATE OUTSIDE A PLAN OF REORGANIZATION

1. Sales Which Impermissibly Thwart the Requirements of Confirmation

A certain natural tension exists between § 363(b) and the built-in Chapter 11 safeguards relating to plans of reorganization, such as compliance with disclosure, creditor acceptance and confirmation

procedures. In many instances, both the seller and the buyer prefer the undeniably streamlined § 363(b) sale procedure which can accomplish a sale with a great deal less time and expense.

Nevertheless, the court, on its own or at the urging of a party in interest, may not view such a sale as appropriate, particularly under circumstances: (a) which appear to dictate the terms of a subsequent plan; (b) where the sale process or proceeds benefit one creditor; (c) when no apparent reason dictates haste or, of course; (d) when the sale appears to be in bad faith. See, e.g., In re Beker Industries Corp., 64 Bankr. 900 (Bankr. S.D.N.Y. 1986), rev'd on other grounds, 89 Bankr. 336 (S.D.N.Y. 1988) (rejecting sale because there were insufficient business reasons to support it, proposed proceeds were not significant and there was a possibility of reorganizing the business); In re Industrial Valley Refrig. & Air Cond. Supplies, Inc., 77 Bankr. 15, 22 (Bankr. E.D. Pa. 1987) (rejecting sale because offering price was too low and evidence of bad faith existed because debtor's principal had entered into an employment contract with the prospective purchaser); In re Schipper, 109 Bankr. 832 (Bankr. N.D. Ill. 1989) (sale to parents for price lower than one previously offered was approved because parental relationship was disclosed at the time court approval was sought and the risk assumed by parents by holding onto the property justified the lower price); In re George Welsh Chevrolet, 118 Bankr. 99 (Bankr. E.D. Mo. 1990 (rejecting a 363 sale where evidence suggested that purchase offers from other interested entities might result in cash payments at least equivalent to those contemplated by the proposed sale, and where proposed sale involved many contingencies, any one of which would jeopardize a prospective purchaser's ability to operate the business after the sale); In re Fremont Battery Co., 73 Bankr. 277, 279 (Bankr. N.D. Ohio 1987) (rejecting § 363 sale because the sale proceeds would only benefit one creditor and the asset would not depreciate in value); In re Crutcher

Resources Corp., 72 Bankr. 628 (Bankr. N.D. Texas 1987) (rejecting sale because of possible bad faith and lack of evidence that the relevant asset would depreciate in value).

A primary reason for denial of such a motion is the premise that the sale constitutes a “creeping plan” of reorganization; cutting off the rights of creditors to vote on and object to a plan. The leading cases rejecting the sale of major assets under § 363 are In re Lionel Corp., 722 F.2d 1063 (2d Cir.1983); In re Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983), and In re Continental Airlines, Inc., 780 F.2d 1223 (5th Cir. 1986). In Continental, the order approving the sale was vacated and the case remanded for determination of whether the creditors’ rights under § 1129 (requirements for confirmation) were unfairly denied by virtue of the pre-confirmation sale. The court stated: “In Braniff we recognized that a debtor in Chapter 11 cannot use § 363(b) to sidestep the protection creditors have when it comes time to confirm a plan of reorganization. Likewise, if a debtor were allowed to reorganize the estate in some fundamental fashion pursuant to § 363(b), creditor's rights under, for example, 11 U.S.C. §§ 1125, 1126, 1129(a)(7), and 1129(b)(2) might become meaningless. Undertaking reorganization piecemeal pursuant to § 363(b) should not deny creditors the protection they would receive if the proposals were first raised in the reorganization plan.” 780 F.2d at 1227-28. Compare In re Air Beds, Inc., 92 B.R. 419 (9th Cir. BAP 1988). There, the court held that “the bankruptcy court abused its discretion because the order allowing the distribution of sale proceeds allows the debtor to circumvent the provisions of the Bankruptcy Code for the administration of a case under Chapter 11.” Id. at 422. The court noted that “the general rule is that a distribution on a prepetition debt in a Chapter 11 case should not take place except pursuant to a confirmed plan of reorganization, absent extraordinary circumstances.” Id.; see also In re Swallen’s Inc., 269 B.R. 634

(6th Cir. BAP 2001) (denying motion to distribute funds in liquidating chapter 11 case where no plan or disclosure statement had been filed).

2. Circumstances In Which Section 363(b) Sales are Appropriate

It is widely accepted that § 363(b) permits sales of the debtor's property outside the plan of reorganization process without conversion to Chapter 7. See, e.g., In re WHET, Inc., 12 B.R.. 743 (Bankr. D. Mass. 1981). The circumstances under which a sale may be made are the subject of dispute, however. Certainly, such sales are at least subject to additional scrutiny. Mission Iowa Wind Co. v. Enron Corp., 291 B.R. 39 (S.D.N.Y. 2003) (requiring more than cursory examination where a debtor opts to sell its assets pursuant to § 363).

(a) Existence of an Emergency

In re White Motor Credit Corp., 14 B.R.. 584 (Bankr. N.D. Ohio 1981), was a leading case that authorized the sale of substantially all of the debtor's operating assets, but the court did so under its general equitable powers (§ 105) rather than directly under § 363 (b). Although acknowledging that Congress probably intended that disclosure standards govern Chapter 11 proceedings, the court permitted the sale to proceed because an emergency existed and there appeared to be no reasonable alternative to the proposed sale and no possibility of reorganization. Finding further that the sale price was reasonable and that disclosures concerning the sale process had been made to various creditor committees, the court authorized the sale without approving a disclosure statement and plan of reorganization. Id. at 590-92. Akin to an emergency situation, a number of decisions have justified § 363 (b) sales on the basis of rapid asset depreciation. For example, one court authorized a § 363 (b) sale where the seasonal value of the assets combined with the delay in accepting the prospective buyer's offer arguably risked decreasing the value of the asset. Apex Oil Co. v. Vanguard Oil & Serv. Co.,

Inc. (In re Vanguard Oil & Serv. Co., Inc.), 88 B.R. 576, 580 (E.D.N.Y. 1988). Another court held that “clear justification” for a sale under § 363(b) existed where the value of the debtor’s estate would be impaired unless its assets were sold quickly. Big Shanty Land Corp. v. Comer Properties Inc., 61 B.R. 272, 278 (N.D. Ga. 1985). See also International Bank of Miami v. Brock (In re Dania Corp.), 400 F.2d 833, 835-37 (5th Cir. 1968), cert. denied, 393 U.S. 1118 (1969) (upholding the sale of the debtor’s major asset due to rapidly deteriorating value).

The concept of “perishability” or the existence of an “emergency” predated § 363 (b) and supported decisions to permit asset sales under § 116 (3) of the former Bankruptcy Act. See, e.g., In re Solar Mfg. Corp., 176 F.2d 493 (3d Cir. 1949).

(b) Business Justification Test

Other cases addressing the propriety of § 363(b) sales outside the plan confirmation process take a much less restrictive approach toward § 363 (b) sales than that espoused in the White Motor case. In the leading case of Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063 (2d Cir. 1983), the court expressly held that an emergency did not need to exist to justify the proposed sale of the debtor’s most valuable asset. Instead, the court adopted a broader “business justification” rule—i.e., a good business reason must exist to permit the sale. Id. at 1071; see also Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380 (2d Cir. 1997). The Lionel rule probably encompasses the White Motor situation, for certainly an emergency would constitute a good business reason to permit a sale to go forward.

Many courts have followed Lionel’s example and held that the judge has discretion to evaluate the following criteria in connection with the decision to authorize or reject a proposed § 363 (b) sale: Whether adequate notice was given to all interested parties; the proportionate value of the asset to the

estate as a whole (presumably the higher the percentage of assets being sold, the greater the need for disclosure, creditor acceptance and confirmation procedures); the amount of elapsed time since filing (this may indicate whether the asset has been properly or widely marketed); the likelihood that a plan of reorganization will be proposed and confirmed in the near future; the effect of the proposed sale on future plans of reorganization; the anticipated proceeds to be obtained from the sale as compared to any appraisals of the property; and whether the asset is increasing or decreasing in value. See In re Chateaugay Corp., 973 F.2d 141 (2d Cir. 1992); Gekas v. Pipin (Matter of Met-L-wood Corp.), 861 F. 2d 1012, 1017 (7th Cir. 1988); In re Continental Air Lines, Inc., 780 F. 2d 1223, 1226 (5th Cir. 1986) (discussed above); In re Ionosphere Clubs, Inc., 100 B.R. 670, 674 (Bankr. S.D.N.Y. 1989) (justifying sale of shuttle assets by compelling business reasons and board exercised independent good faith); In re Seven Bar Land & Cattle Co., 92 B.R. 927, 930 (Bankr. D.N.M. 1988) (approved public sale of all assets where price was reasonable and fair; sale would have been approved under plan); Coastal Industries, Inc. v. United States (In re Coastal Industries, Inc.), 63 B.R. 361, 367 (Bankr. N.D. Ohio 1986) (request to sell a large portion of Debtor's assets warranted by emergency, not fraudulent and no lack of good faith); In re Burke Mountain Recreation, Inc., 56 B.R. 72, 73 (Bankr. D. Vt. 1985) (approving sale of land where creditor was adequately protected, appears that sale would not impact income). In In re Work Recovery, Inc., 202 B.R. 301 (D. Ariz. 1996), the court approved the proposed sale, noting that the asset constituted about 25% of the value of the company, and that the sale would significantly eliminate debt while providing a fund for payment of creditors, without affecting the rights of creditors to ultimately approve or disapprove a plan of reorganization.

Some courts have relaxed the Lionel standard and are willing to permit the substantial asset sale under § 363 (b) merely if there is sound business justification, other than the appeasement of major

creditors. See Stephens Industries, Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986) (holding that good reason existed to permit the § 363(b) sale where a radio station would lose its FCC license if it went off the air); In re Federal Mogul Global, Inc., 293 B.R. 124 (D. Del. 2003) (Court should approve debtor's use of assets outside the ordinary course of business if debtor can demonstrate a sound business justification for the proposed transaction); In Re Montgomery Ward Holding Corp., 242 B.R. 147 (Bankr. D. Del. 1999) (holding that sale powers under § 363 should be interpreted liberally to provide a bankruptcy judge with substantial freedom to tailor his or her orders to meet differing circumstances and to avoid shackling the judge with unnecessarily rigid rules); In re New Era Resorts, LLC, 238 B.R. 381 (Bankr. E.D. Tenn. 1999) (sale was for best possible price and beneficial to creditors); Matter of Brethren Care of South Bend, Inc., 98 B.R. 927, 933 (Bankr. N.D. Ind. 1989) (holding that good reason existed for sale of assets where debtor was financially unable to make adequate payments, confirmation of plan was unlikely, delay in selling assets would not be in any party's best interest, and objectors failed to submit any good alternatives); In re Naron & Wagner, Chartered, 88 B.R. 85, 87 (Bankr. D. Md. 1988) (holding that good business reasons existed where failure to close sale quickly would likely result in the cessation of the business' continuous operations, the purchase price exceeded the estimated liquidation value of the asset, and proceeds of the proposed sale would be sufficient to pay non-insider creditors in full).

(c) Best Interest Test

Other courts have sidestepped Lionel and adopted a "best interest" test authorizing substantial assets sale under § 363(b) only if the sale is found to be in the best interest of the estate. See Financial Associates v. Loeffler (In re Equity Funding Corp.), 492 F.2d 793, 794 (9th Cir.) cert. denied, 419 U.S. 964 (1974) (holding that because market value of asset was likely to deteriorate substantially in the

near future, the sale was in the estate's best interest); In re Planned Systems, Inc., 82 B.R. 919, 922 (Bankr. S.D. Ohio 1988); In re Bertholet Enterprises, Inc., 66 B.R. 566, 567 (Bankr. D.N.H. 1986); In re Charlesbank Laundry Co., 37 B.R. 20, 22 (Bankr. D. Mass. 1983). Some courts have embellished the best interest test to add the seemingly obvious notion that the sale be in good faith. See In re Apex Oil Co., 92 B.R. 847, 866 (Bankr. E.D. Mo. 1988) (holding that the sale is in the best interest of the estate if it is for a reasonable price and made in good faith); In re Wilde Horse Enterprises, 136 B.R. 830, 842 (Bankr. C.D. Cal. 1991) (holding that it is not bad faith per se for an insider to purchase property from an estate, even where the insider has a fiduciary duty to the estate). See also In re Abbotts Dairies of Pennsylvania, Inc., 788 F. 2d 143, 149-150 (3d Cir. 1986); Matter of Phoenix Steel Corp., 82 B.R. 334, 336 (Bankr. D. Del. 1987); In re Industrial Valley Refrig. & Air Cond. Supplies, Inc., 77 B.R. 15, 20 (Bankr. E.D. Pa. 1987).

3. Lienholder Rights to Bid in Claims: Section 363 (k)

Section 363 (k) provides that, unless the court for cause orders otherwise, a lienholder may bid at a sale and, if it purchases the assets being sold, may offset the value of its claim against the purchase price. In re California Hancock, Inc., 88 B.R. 226, 229 (9th Cir. BAP 1988). Interesting issues arise when there are multiple lienholders, however. If a senior lienholder has been granted adequate protection for its interest under § 362 (c), (d), (e) or (f), a junior lienholder or buyer will be required to meet the adequate protection requirement. 11 U.S.C. § 363(d). Moreover, any secured creditor holding a lien on property proposed to be sold may request that the court (or the court, on its own, may) prohibit or condition the sale as necessary to provide adequate protection of such interest. 11 U.S.C. 363 (e). Further discussion of § 363(k) rights can be found below in the “advanced concepts” section of these materials.

In addition, a non-recourse, undersecured creditor has rights under § 1111(b) that may impact on a proposed sale of assets. (In a § 363 sale, these rights are replaced by the right to credit bid. See, e.g., In re Way Apartments, DT, 201 B.R. 444, (N.D. Tex. 1996)). The reorganization of the debtor also will address and attempt to resolve other issues confronting the debtor, and, for precisely this reason, a sale within a plan may be desirable.

III. ADVANCED CONCEPTS IN §363 SALES

A. SUCCESSOR LIABILITY CLAIMS

Under the common law rule, a corporation that purchases for cash the assets of another corporation does not assume the seller corporation's liability. Travis v. Harris Corp., 565 F.2nd 443, 446 (7th Cir. 1977). See also, e.g., Kemos, Inc. v. Bader, 545 F.2d 913, 915 (5th Cir. 1977). Recent cases have qualified that rule. In re Trans World Airlines, Inc., 322 F.3d 283 (3rd Cir. 2003) (ruling successor liability claims to be "connected to or arise from the assets sold."). Exceptions to rule include: (a) express or implied assumption of liability; (b) transaction amounts to a restructuring (merger/consolidation) of two corporations; (c) purchasing entity is a mere continuation of seller²; (d) Asset transfer to purchaser is for fraudulent purpose of escaping liability. Id. pp. 7-9.

In addition, claims based on violations of NLRA and LMRA will not be extinguished. See, e.g., Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n. 5 (1973) (imposing successor liability for predecessor's unlawful discharge of employee where successor substantially assumes predecessor's assets, continues predecessor's operations without interruption or substantial change, and successor had notice of pending unfair labor practice law at time of acquisition); John Wiley & Sons, Inc. v.

² In Mickowski v. Visi Trak Worldwide, LLC, 2004 WL 1253024 p.7 (N.D.Ohio, 2004), the court held that a husband and wife not the same entity for purposes of the Ohio continuation successor liability doctrine,

Livingston, 376 U.S. 543 (1964) (similarly finding successor liability under Labor Management Relations Act).

B. LESSEE'S POSSESSORY INTERESTS

Legislative history supports the position that leasehold interests are included under parameters of §§ 363(f) and 365(h). United States v. Azeem, 946 F.2d 13, 17 (2d Cir. 1991) (holding no restrictions should be read into § 363(f) as Congress did not make such distinction). Maximization of the value of the estate's assets and the repayment of debtors compel an interpretation that, notwithstanding § 363(h)(1), property can be sold under § 363(f) free and clear of a lessee's real property leasehold interest. A contrary interpretation would give a lessee inequitable veto power to adversely effect the debtor and other creditors relying on the sale of the property for satisfaction of their claims.

In Precision Industries, Inc., v. Qualitech Steel SBQ, LLC (In re Qualitech Steel Corp.), 327 F.3d 537 (7th Cir. 2003) the Seventh Circuit Court of Appeals upheld a bankruptcy court's sale of assets that was "free and clear" of the interests of the debtor's lessee to possess and use the leasehold property sold to a third party. In Qualitech, the Lessee, Precision Industries, leased property from Chapter 11 Debtor. The lessee filed an adversary complaint seeking a ruling that its possessory interest in the leased property survived the bankruptcy sale where Debtor's assets were sold "free and clear" of other interests. The Bankruptcy Court for the Southern District of Indiana held the sale extinguished the lessee's possessory rights and lessee appealed. The District Court reversed and remanded and the purchaser appealed. The Court of Appeals for the Seventh Circuit again reversed and held that § 365(h) does not supercede § 363(f).

The court found that the language of § 365(h)(1)(A) suggests it has a limited scope and applies “[i]f the trustee [or debtor-in-possession] rejects an unexpired lease of real property . . .” Qualitech, 327 F.3d at 547. Section 365(h) focuses on a specific type of event, that is, the rejection of an executory contract by the trustee or debtor-in-possession. It does not say anything about the sale of estate property, that is the province of § 363. In Qualitech, a sale of the leased property rather than a rejection of the lease was at issue.

Section 363 provides for a mechanism to protect the interests of parties that may be adversely affected by sale of estate property. Specifically, § 363(e) directs the bankruptcy court, on the request of any entity with an interest in the property to be sold, to “prohibit or condition such . . . sale . . . as is necessary to provide adequate protection of such interest.” 11 U.S.C. § 363(e). The Court in Qualitech noted that because a leasehold qualifies as an “interest” in property, a lessee of property being sold would have the right to insist that interest be protected.³ Accord, In re Downtown Athletic Club of New York City, Inc., 2000 WL 744126 (S.D.N.Y. 2000) (“Under the expansive interpretation of “any interest” under § 363(f)(4), Defendants’ asserted possessory rights as lessees fall within the scope of this section. The parties dispute whether the term “any interest” includes Defendants’ asserted right to obtain leases. While CBA concedes that the Bankruptcy Code does not define the term “interest,” CBA correctly maintains that according to the term’s plain meaning, it includes Defendants’ asserted leasehold interests. See In re Lady H Coal Co., Inc., 193 B.R. at 246 (noting “the generally broad interpretation of ‘any interest’ as utilized under § 363(f)”); see also WBQ Partnership v. Commonwealth of Va. Dep’t

³ A related issue is whether res judicata bars a lessee from challenging a sale order already entered. The Court in Qualitech found that sale orders are final appealable orders. The Court went on to say that once the time for appeal from the sale order has expired, res judicata precludes a party to the sale from attacking the sale order in a new lawsuit. Qualitech, at 543.

of Med. Assistance Services (In re WBQ Partnership), 189 B.R. 97, 105 (Bankr. E.D. Va.1995) (noting that the term "interest" extends beyond liens); In re Taylor, 198 B .R. 142, 162 (Bankr. D.S.C. 1996) (finding that "it appears that a leasehold is a type of 'interest' that fits within the plain text of the §363(f) statute").”).

With regard to compensation, under § 363(f), the Court held that “[a]dequate protection’ does not necessarily guarantee a lessee’s continued possession of the property, but it does demand, in the alternative, that the lessee be compensated for the value of its leasehold-typically from the proceeds of the sale.” Qualtech, at 548; see also Unwritten Limitation?, 19 AM. BANKR. INST.J. at 22 &n. 5, citing, *inter alia*, In re Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935)(L. Hand, J.), and La Jolla Mortgage Fund v. Rancho El Cajon Assocs., 18 B.R. 283, 286 (Bankr. S.D. Cal.1982).

“[T]he adequate protection provision is not designed to put the holder of a secured claim in the same position as when the transaction was initially negotiated.” See In re Hutton-Johnson Co., Inc., 6 B.R. 855, 860 (Bankr. S.D.N.Y. 1980). The operative date for making the calculation of the amount of the claim entitled to adequate protection is the date on which the petition commencing the case was filed. See Matter of Mulcahy, 5 B.R. 558, 563 (Bankr. D.Conn. 1980); In re Alyucan Interstate Corp., 12 B.R. at 812 n.18 (Bankr. D. Utah 1981).

C. CLAIMS OF ADVERSE POSSESSION

In In re Colarusso, 295 B.R. 166 (1st Cir. BAP 2003) the First Circuit BAP upheld the bankruptcy court’s sale of real property free and clear of the competing claim of an adverse possessor. The court noted that a claim of adverse possession is one that, under Massachusetts law, requires the claimant prove it had gained title to the property. As the estate took title to whatever interest the debtor had, including the right to challenge the claim, before the claimant began its state court action to

determine title, the estate had an interest in the property per Whiting Pools. Thus, the property was property of the estate that could be sold free and clear of interests—including an adverse possession claim.

D. FREE AND CLEAR OF A LICENSE

In FutureSource LLC v. Reuters Limited, 312 F.3d 281 (7th Cir. 2002) the Seventh Circuit held that a sale pursuant to § 363(f) had extinguished all “interests” in the assets acquired by Reuters, including an interest in intellectual property. In FutureSource, the sale order provided that the sale was free and clear of all liens, claims, interests and encumbrances. The assets sold included certain license rights to information and software. The Plaintiff brought an action against the asset purchaser Reuters to compel it to continue to perform under the contract. The court held that although FutureSource did initially have license rights under the contract, those rights had been expunged, including any “interest in the intellectual property that Reuters acquired from Bridge [the Debtor].” Id. at 285. Although leasehold interests were not at issue in this case, (foreshadowing its decision in Qualtech Steel, discussed above) the court noted that if 363 sales could extinguish leaseholds, then surely it would extinguish a license. Id.; see also In re Cellnet Data Systems, Inc., 327 F.3d 242 (3rd Cir. 2003) (holding that asset purchase agreement excluding license agreement severed royalties payable by licensee from use of intellectual property; in addition, holding that licensee’s election to retain rights to licensed property, subject to royalty payments due under original license, operated to restore rights of contract as they were pre-petition and pre-rejection, thus, debtor not purchaser was entitled to payment of renewed royalties); Robert J. Rosenberg, Susan Block Lieb, Sales under Section 363, ABI Views From the Bench CLE Materials, September 2003.

E. INTERACTION OF SECTION 363(K) WITH SECTION 363(B)(1) SALE.

At a sale of property under § 363(k), subject to a lien that secured an allowed claim, “the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.” 11 U.S.C. § 363(k). Secured creditor’s right to bid only applies when a debtor’s assets are sold outside of a plan; it does not apply to assets which are subject of confirmed plan of reorganization. See In re Orfa Corp., 22 Bankr. Ct. Dec. 427 (Bankr. E.D. Pa. 1991). An allowed secured claim is a secured claim only to the extent of value of such creditor’s interest in the lien assets. 11 U.S.C. § 506(a).

Value of the secured claim “shall be determined in light of the purpose of the valuation and the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use affecting such disposition or use or on a plan affecting such creditor’s interest.” 11 U.S.C. § 506(a). Offsets are limited to claims secured by liens as defined by § 101(37). The Credit bid mechanism protects the secured creditor’s contract by insuring that the debt is paid in full or the collateral stands in place of the debt. In re Kent Terminal Corp., 166 B.R. 555, 565 (Bankr. S.D.N.Y. 1994).

Where the interest of a holder of a secured claim is in bona fide dispute, parties may attempt to block a credit bid. In re McMullan, 196 B.R. 818, 835 (Bankr. W.D. Ark. 1996). If there is a bona fide dispute, a creditor may be permitted to bid as long as it can provide the court adequate assurances of its ability to compensate the estate should its claim ultimately be disallowed. See In re Miami General Hospital, Inc., 81 B.R. 682 (S.D. Fla. 1988); In re St. Croix Hotel Corp., 44 B.R. 277 (D. V.I. 1984) (allowing credit bid by Bank of Nova Scotia); In re Octagon Roofing, 123 B.R. 583 (Bankr. N.D. Ill. 1991) (allowing provision of an irrevocable letter of credit as adequate protection).

Not every proceeding will be considered a bona fide dispute. See e.g., In re Vortex Fishing Systems, Inc., 277 F.3d 1057 (9th Cir. 2001) (holding that the mere existence of litigation is not sufficient to create a bona fide dispute); In re Taylor, 198 B.R. 142, 162 (Bankr. D.S.C. 1996) (“not any alleged dispute” is automatically bona fide).

E. “BREAK UP FEES”

Bidding protection mechanisms are employed by Debtors to encourage potential buyers to make bids to purchase assets. Such protections can include one or a combination of incentives including break-up fees, overbid protections and expense reimbursements. See, e.g., Integrated Resources, 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992) aff’d, 147 B.R. 650 (S.D.N.Y. 1992). “Break up fees” refers to compensation paid to initial bidders for valuation of the assets and formulation of the initial bid in situation where a proposed sale is not consummated because a subsequent bidder submits a bid of a higher value. The advantage of providing for such fees is that they compensate an initial bidder’s diligence, upon which subsequent bidders rely and can create incentives for increased bidding. See Wintz v. American Freightways, Inc. (In re Wintz Co.), 230 B.R. 840, 846 (8th Cir. BAP 1999). However, the final cost of the sale is increased if subsequent bidder prevails.

1. Standards:

(a) “Business judgment rule”.

Courts have approved break-up fees where the debtor has determined in its business judgment that such a fee will benefit the estate. See Calpine Corp. v. O’Brien Environmental Energy, Inc. (In re O’Brien Environmental Energy, Inc.), 181 F.3d 527, 533 (3rd Cir. 1999); In re Integrated Resources, Inc., 147 B.R. 650, 657 (S.D.N.Y. 1992), appeal dismissed, 3 F.3d 49 (2nd Cir. 1993); see also In re Twever, Inc., 149 B.R. 954 (Bankr. D. Colo. 1992); but see In re America West Airlines, Inc., 166

B.R. 908, 912 (Bankr. D. Ariz. 1994) (“the standard is not whether a break-up fee is within the business judgment of the debtor, but whether the transaction will ‘further the diverse interests of the debtor, creditors and equity holders, alike.’ The proposed break-up fee must be carefully scrutinized to insure that the Debtor's estate is not unduly burdened”). Some of the elements to be considered include:

- i. Existence of self-dealing or manipulation in relationship of parties negotiating break-up fees;
- ii. The debtor believes that such fees will benefit the estate; and
- iii. Effect of fees on bidding indicates no specific harm to the estate.

See AgriProcessors, Inc. v. Iowa Quality Beef Supply Network, L.L.C. (In re Tama Beef Packing, Inc.), 290 B.R. 90, 97 (8th Cir. BAP 2003).

(b) “Best Interest of the Estate” test.

Some courts look to whether the fee is in the best interest of the estate and not unduly burdensome. See, e.g., In re O’Brien, 181 F.3d at 535; In re Tama Beef Packing Inc., 284 B.R. 889, 892 (Bankr. N.D. Iowa 2002); In re Tiara Motor Coach Corp., 212 B.R. Ind. 1997); In re S.N.A. Nut Co., 186 B.R. 98 (Bankr. N.D. Ill. 1995); In re American West Airlines, Inc., 166 B.R. 908 (Bankr. D. Ariz. 1994) (discussed above); In re Hump Industries, Inc., 140 B.R. 191 (Bankr. N.D. Ohio 1992); See also Bruce A. Markell, The Case Against Breakup Fees in Bankruptcy, 66 AM. BANKR. L.J. 349, 353 (1992). Factors to be considered include:

- i. Is there a correlation between the fees and the maximization of value of the debtor’s estate;
- ii. Was the agreement between the debtor’s estate and the acquiring party negotiated at arm’s length?

- iii. Are the concessions supported by the principal secured creditors and the official creditors' committee?
 - iv. Is the break-up fee a reasonable and fair percentage of the proposed purchase price? See, e.g., Integrated Resources, 147 B.R. 662 (approving a break-up fee of 1.6% of purchase price); Cottle v. Storer Communication, 849 F.2d 570, 578-79 (11th Cir. 1988) (approving break-up fee of approximately 1% of purchase price); Beebe v. Pacific Realty Trust, 578 F. Supp. 1128, 1150-51 (D. Ore. 1984) (approving 1% breakup fee); In re Twenver, Inc., 149 B.R. 954, 957 (Bankr. D. Col. 1992).
 - v. Is the break-up fee so substantial that it causes a "chilling effect" on potential bidders?
 - vi. Do there exist safeguards beneficial to the debtor's estate?
 - vii. Will unsecured creditors who oppose the break-up fee suffer a substantial adverse effect?
- (c) Treatment of break-up fees as an allowable administrative expense under § 503(b) and the "Administrative Claim Test".

A break-up fee may be treated as an administrative expense. In re O'Brien, 181 F.3rd at 532; see also Tama Beef Packing, Inc., 290 B.R. 90 (finding break-up fees allowable as administrative expense claims); In re Diamonds Plus, Inc., 223 B.R. 829 (Bankr. E.D. Ark. 1999) (court analyzed break-up fees under § 503(b). In Tama Beef the court agreed with the Third Circuit's holding in O'Brien that there is no reason for treating an application for a break-up fee any differently than general administrative expense claims. Tama Beef, 290 B.R. at 97-98. The court went on to hold that "the determination of whether break-up fees or expenses are allowable under Section 503(b)(1)(A) will be made in reference to general administrative expense jurisprudence." Id. at 98.

Even though break-up fees may be treated as administrative expenses, in order to ensure that the fee will be paid, it is advisable that the term of the sales procedures order providing for the breakup fee include language securing the fee by the sales proceeds. See In re CXM, Inc., 307 B.R. 94, 104-

05 (Bankr. N.D. Ill. 2004) (where there is no priming lien, an unsuccessful bidder's claim to a breakup fee is junior to secured creditors' interests in sale proceeds; as they were insufficient to pay the secured creditor in full; bidder did not receive the breakup fee).

F. AVOIDING TAX LIABILITY

Section 1146(c) of the Bankruptcy Code provides that the "issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed . . . , may not be taxed under any law imposing a stamp tax or similar tax." Although not specifically defined in the Bankruptcy Code, "similar taxes" have been interpreted as real estate transfer taxes and recordation taxes. In re NVR, LP, 189 F.3d 442, 448 (4th Cir. 1999) (also discussing sovereign immunity issues and rejecting the proposition that transfers prior to confirmed reorganization are exempt under § 1146(c)). The Second Circuit Court of Appeals has adopted the following test relative to the application of § 1146(c) to stamp or transfer taxes:

- 1) they are imposed only at the time of transfer or sale of the item at issue;
- 2) the amount due is determined by the consideration for, par value of, or value of the item being transferred;
- 3) the tax rate is a relatively small percentage of the consideration, par value or value of the property;
- 4) the tax is imposed irrespective of whether the transferor enjoyed a gain or suffered a loss on the underlying sale or transfer; and,
- 5) in the case of state documentary transfer taxes, the tax must be paid as a prerequisite to recording.

995 Fifth Avenue Assocs. , L.P., v. New York, 963 F.2d 503, 512 (2nd Cir. 1992).

The application of § 1146(c) to other state taxation schemes, such as sales and use taxes, does not appear to be supported by case law. For example, in 995 Fifth Avenue, the Second Circuit held that a

sale under a plan was not exempt from a 10% tax on gains resulting from the transfer of real property. 963 F.2d at 513. Additional support for a narrow interpretation of the § 1146(c) exemption can be found in other recent cases. See, e.g., In re GST Telecom Inc., 2002 WL 442233 (D. Del. 2002) (finding four of the five elements noted in 995 Fifth Avenue were met, but that Washington State use tax rate of 6.5% was greater than the 1% tax rate threshold that should be considered equivalent to a stamp tax); In re GST Telecom Inc., 2002 WL 1737445 (D. Del. 2002) (finding California sales tax of 4.75% is not a stamp or similar tax qualifying under the §1146(c) exemption, and noting that service requirements must be met where debtor specifically requested and received an order setting a bar date for filing tax proofs of claim).⁴

The § 1146(c) exemption is also often invoked in a § 363 sale outside the confines of a Chapter 11 plan. However, such application of § 1146(c) is problematic. For example, a California bankruptcy court struck a § 1146(c) tax exemption provision of a proposed sale order as patently invalid as the sale was not proposed as part of a plan. See In re Automation Solutions International, LLC, 274 B.R. 527, 528-29 (Bankr. N.D. Cal. 2002). However, other courts have extended the benefits of § 1146(c) to § 363 sales. See, e.g., City of New York v. Baldwin League of Indep. Schools (In re Baldwin League of Indep. Schools), 110 B.R. 125, 128 (Bankr. E.D.N.Y. 1990) (affirming a bankruptcy court decision finding that a preconfirmation transaction was exempt from a recordation tax); In re Permar Provisions, Inc., 79 B.R. 530, 534 (Bankr. E.D.N.Y. 1987).

G. CURE

⁴ A discussion of this issue from the standpoint of the National Association of Attorneys General was recently published in the American Bankruptcy Institute Journal. See Karen Cordry, The Incredible Expanding § 1146(c), AM. BANKR. INST. J. at 10 (December/January 2003). The author argues that the §1146(c) exception is being inappropriately applied in an attempt to broaden its scope to include such things as sales and capital gains taxes.

Section 1123 (a)(5) specifically permits a plan of reorganization to provide for the "curing or waiving of any default." In addition, 1124 (2)(A) generally provides (subject to certain conditions) that a secured claim is not impaired if it cures any default. It has been held that, through a plan of reorganization, a debtor may avoid the payment of default interest on a secured obligation, whether or not matured. In re Entz-White Lumber and Supply, Inc., 850 F.2d 1338 (9th Cir. 1988). A cure 'nullifies all consequences of the default – including the higher postdefault interest rate.'" In re Udhus, 218 B.R. at 517, quoting In re Johnson, 184 B.R. 570, 574 (Bankr. D. Minn. 1995). The question arises as to whether payment through a §363 sale likewise constitutes a cure, such that default interest can be avoided. Such a result was obtained in In re Casa Blanca Project Lenders, 196 B.R. 140, 148 (9th Cir. BAP 1996). It should also be noted that such an application is not universally accepted. See Matter of Southland Corp., 160 F.3d 1054, 1059 (5th Cir. 1998) ("Some poorly-reasoned cases have denied default interest to creditors by extending the Entz-White reasoning beyond § 1124 cures"); In re Boardwalk Partners, 171 B.R. 87, 90, n.1 (Bankr. E.D. Ariz. 1994); In re Melbell Associates, Inc., 99 B.R. 31, 34 (Bankr. E.D. Cal. 1989). In Casa Blanca, the court indicated that the specific circumstances in that case supported its holding that the unwinding of the consequences of default through a cure should be applied to that particular situation. Specifically, debtor had already filed a plan providing for the sale of some remaining lots and had "for all practical purposes, ... fulfilled the requirements of a liquidating plan." Casa Blanca, 196 B.R. at 147.

The existence of this article raises the possibility that more taxing authorities will be focusing on the application of §1146(c).

With regard to avoidance of "unreasonable" charges under § 506(b) (providing for allowance, as part of a secured claim, of "any reasonable fees, costs, or charges provided for under the agreement under which such claim arose"), no distinction can be drawn as to whether a plan is confirmed⁵.

F. GOOD FAITH

1. Scrutiny of Bidders

Almost anyone—except a trustee, court officers and, possibly, the trustees’ employees—may purchase Chapter 11 assets. 18 U.S.C. 154. Sales of a business debtor’s assets to insiders (e.g., officers, directors, shareholders or partners) or fiduciaries, while not expressly prohibited by the Bankruptcy Code, probably will be subjected to greater judicial scrutiny as a practical matter. See, e.g., Jackson v. Pacific Energy Resources (In re Transcontinental Energy Corp.), 683 F.2d 326, 328 (9th Cir. 1982) (“Even a fair transaction for adequate consideration will be set aside if there is an appearance of impropriety and a great potential for a conflict of interest.”); In re Simon Transp. Services, Inc., 292 B.R. 207 (Bankr. D.Utah 2003) (when insider is used as stalking horse in bankruptcy sale, debtor must show: that some sound business reason exists for the sale; that there has been adequate and reasonable notice to interested parties, including full disclosure of terms of sale; that sales price is fair and reasonable; and that proposed buyer is proceeding in good faith).

2. Mootness Rule

Placing a specific finding of good faith on the part of the purchaser in the order confirming a § 363 sale is critical as the sale cannot be set aside on appeal in the face of such a finding. Specifically, 11 U.S.C. § 363(m) provides that:

⁵ “[u]nder § 506(b) four elements must be satisfied if fees and costs are allowed. First, the creditor must have an allowed secured claim; second, the creditor’s security agreement must provide for the requested charge; third, the

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

An example of the application of this somewhat idiosyncratic aspect of § 363 is found in the recent case of In re M Capital Corp., 290 B.R. 743 (9th Cir. BAP 2003). In M Capital, an order was entered approving the sale of the debtor's stock free and clear of the appellants' lien. The appellants, T.C. Investors ("T.C.") and others, then argued that the order should not have provided that the sale was free and clear and that they should have been allowed to exercise their credit bid rights. Id. at 746. No stay pending appeal was granted, the sale was completed, and funds were distributed. Id. Appellees argued that safe harbor of § 363(m) applied and alternatively, that the appeal was moot under general equitable principals. Id. citing Alergan, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1423-24 (9th Cir. 1985) ("failure to obtain a stay pending appeal has 'permitted such a comprehensive change in circumstances as to render it inequitable for this court to consider the merits of the appeal'"; and, alternatively, need for finality precluded review).

The BAP found that there had been no determination of the purchasers' good faith by the bankruptcy court and that the bankruptcy mootness rule only operates where a purchaser purchased an asset in good faith. In re M Capital Corp., 290 B.R. at 746, citing Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1173 (9th Cir. 1988). The BAP also refused to make a determination of good faith as the record did not reflect any bad faith on the part of the purchaser as such determinations are better left to the bankruptcy courts. In re M Capital Corp., 290 B.R. at 747. The panel noted with approval the bankruptcy court's refusal to make a finding of good

creditor must be over secured; and fourth, the fee or cost must be reasonable." Udhus, 218 B.R. at 517.

faith at a subsequent hearing on a request that the sale order be amended to include a good faith finding because the sale had not been completed. Id. at 749. The BAP then refused to remand the issue for determination by the bankruptcy court as the “Movants settled upon the conscious litigation strategy of electing not to proceed when the matter had been fully briefed and the bankruptcy court was willing to set it for an evidentiary hearing and make the requisite determination regarding good faith.” Id. at 751. Thus, the entitlement to rely on the § 363(m) good faith safe harbor was waived.

As a result, the panel noted that although it was not finding the existence of bad faith in the case, the sale could be rescinded should such a finding be made. Id. at 752. In concluding the opinion, the BAP reiterated its position that both courts and litigants must pay close attention to this issue and ensure that an adequate showing of good faith has been made. To do otherwise could result in a fatal error. Id.; see also Thomas v. Namba (In re Thomas), 287 B.R. 782 (9th Cir. BAP 2002) (finding that where the good faith of an asset purchaser is at issue the bankruptcy court must make good faith findings in order for the appellate court to determine whether an appeal is moot).

G. VALUATION

As with other aspects of bankruptcy proceedings, valuation issues arise in the sale process as well. For example, as noted above, the valuation of the secured creditor’s claim, in the context of a sale can affect its ability to credit bid. Specifically, § 363 (k) scrutinizes the “lien that secures an allowed claim”, and § 506 (a), which addresses secured claims’ status, provides that an allowed secured claim is a secured claim only to the extent of value of such creditor’s interest in the lien assets. The value of the secured claim “shall be determined in light of the purpose of the valuation and the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use affecting such disposition or use or on a plan affecting such creditor’s interest.” 11 U.S.C. 506 (a).

Even if the secured creditor's claim had been determined to be undersecured (i.e., a portion of the creditor's claim was secured by value in the collateral, leaving the creditor with an unsecured claim for the balance), the creditor would have the right to bid in the full amount of the claim. See St. Croix Hotel Corp. v. Bank of Nova Scotia (In re St. Croix Hotel Corp.), 44 Bankr. 277 (D.V.I. 1984) (holding that secured creditor, whose lien status and amount had not been allowed, was permitted to offset its claim against the purchase price at § 363 sale, subject to an agreement to pay the estate if the claim subsequently was disallowed).

The choice between an auction pursuant to § 363 versus a plan may impact the value of the property sold. Some commentators argue that property values are depressed in an auction scenario as the pressure for a sale will be advantageous to the buyer. The buyer will believe that the debtor must sell the property immediately. The buyer will also have limited due diligence opportunities and will, therefore, seek a discount to make up for the additional risk. Others argue that auctions serve to maximize the value of the assets as buyers are acting on similar price information and are competitively motivated to be the winning bidder. See Michael P. Richman, Section 363 vs. Chapter 11 Reorganization Plan as a Vehicle for the Sale of Substantially All of a Debtor's Assets, ABI SOUTHWEST BANKRUPTCY CONFERENCE MATERIALS, September 2002 (hereinafter Richman).

Additionally, in the context of a § 363 sale courts may be faced with the difficult task of evaluating several offers or overbids that may contain varying terms. For example, one offer may be subject to the rejection of certain contracts (leases, labor agreements, etc.) while another is not. There may be offers to purchase all the assets or various combinations and a court may be required to determine whether a "bulk" sale or individual lot sale is most advantageous to the estate (also raising allocation issues). Thus, a bidder should be prepared to provide the court with substantive information

establishing the value of any enhancements to its bid. See e.g., In re Financial News Network, Inc., 191 WL 127524 (Bankr. S.D.N.Y. 1991), unreported case (“Our view was that we had a yeoman's task to sift through the accounting forecasts, investment bankers' hyperbole, and media plans involving prolix compartmentalization of television viewing times [in analyzing competing bids from CNBC and Dow Jones & Co.]. Mercifully, we were saved from this exercise of masochistic judicial flagellation”).

IV. COMPARISON TO SECTION 363 SALES TO SALES PURSUANT TO A PLAN OF REORGANIZATION

The plan of reorganization may accomplish any number of objectives ranging from total restructuring of secured debt to providing a return of some sort to equity holders. Almost certainly unsecured debt will be restructured and an effort will be made to solve many of the problems that forced the company into reorganization, if possible. Alternatively, Chapter 11 provides a liquidation option which dovetails neatly with § 363 and permits the orderly liquidation of the debtor, the winding up of its operation and the distribution of its assets (or the proceeds thereof) to creditors.

But the plan process can be cumbersome and expensive. The route to confirmation and implementation is often circuitous and frustrating, particularly for the uninitiated buyer. Sales in connection with plan confirmation may be the most productive—or perhaps the only available—alternative. In any event, it is the specter of the safeguards of the plan confirmation process that haunt those requesting court approval outside of the plan confirmation process for sales under § 363 (b). For that reason alone, several features of the plan process merit discussion.

A. GENERAL OUTLINE OF PLAN REQUIREMENTS

Chapter 11 of the Bankruptcy Code establishes the requirements of reorganization plans which are designed to provide all interested parties with information sufficient to allow them to make an informed decision regarding the proposed reorganization. In general terms, a plan proponent must, among other things: (a) file a plan of reorganization comporting with Chapter 11; (b) file a disclosure statement describing the background of the case and treatment of creditor; (c) schedule and hold a hearing regarding the sufficiency of information contained in the disclosure statement; (d) solicit the votes of claim holders in favor of the plan; and (e) hold a hearing to confirm the plan. See 11 U.S.C. §§ 1123, 1125(b), 1126, and 1129.

Procedurally, the debtor has the exclusive right to file a reorganization plan for 120 days after commencement of the Chapter 11 case. See 11 U.S.C. § 1121(b). The proponent then has an additional 60 days in which to obtain acceptance of the plan. Of course, the proponent must file a disclosure statement setting out all the information reasonably necessary to inform creditors before they vote on the plan. See 11 U.S.C. § 1125.

Impaired classes will each vote separately on the plan and a class will be deemed to have accepted the plan if at least two-thirds in amount and more than one-half in number of the allowed claims votes in favor of the plan. See 11 U.S.C. § 1126(c). Unimpaired classes do not vote as they are deemed to have accepted the plan. The acceptance terms for stockholders are slightly different in that two-thirds in amount of the allowed interests voting must accept the plan. See 11 U.S.C. 1126(d). Finally, a plan may be approved without the consent of unsecured creditors as long as the non-consenting class receives property with a current value equal to the allowed amount of the claims or that all claims or interests junior to the non-consenting class will not receive or retain any property. See 11 U.S.C. § 1129(b)(2)(B); see also Richman at p.514.

Section 1123 provides the debtor wide latitude in dealing with or disposing of its property. The debtor may sell all or part of its property to implement the plan, and (subject only to the plan confirmation requirements of § 129 and the mandatory contents provisions contained in § 1123(a)), may structure the sale on such terms as it can negotiate with the purchaser and the estate's creditors.

Section 1123(a)(5)(D) specifically permits property to be sold either subject to or free and clear of liens, although this section must be read in conjunction with § 363(f). Section 1123(b)(4) permits a debtor to file a liquidating plan under which its property would be sold and the proceeds distributed to creditors.

B. 1111(b) RIGHTS

Section 1111(b)(2) permits the holder of a secured claim to elect to have its claim treated as a secured claim to the extent the claim is allowed, notwithstanding the provision of § 506(a) which otherwise divides even a nonrecourse secured claim into a secured and undersecured portion when the amount of the claim exceeds the value of the collateral. Section 1111 applies to: "a claim secured by a lien on property of the estate...." "A plain reading of § 1111(b) illustrates that Congress intended § 1111(b) to apply to undersecured creditors irrespective of the nature of the collateral securing the debt." United States v. Cook, 147 B.R. 513, 516, (D. S.D. 1992) (citing 3 Norton Bankruptcy Law and Practice, § 58.01 (1991)); See Watt v. Alaska, 451 U.S. 259, 266 n.9 (1981) ("In determining the meaning of any statute, the words of the statute are 'the primary, and ordinarily the most reliable, source of interpreting' its meaning").

An election under § 1111(b) must be made "at any time prior to the conclusion of the hearing on the disclosure statement or within such later time as the court may fix." Fed. R. Bankr. Proc. 3014.

Election is made by at least two thirds in amount and more than half in number of the allowed claims of the class to which such election applies. 11 U.S.C. § 1111(b)(1)(A)(i).

The § 1111(b) election is not available where the property is of inconsequential value, or where “the holder of a claim has recourse against the debtor on account of such claim and such property is sold under section 363 or is to be sold under the plan.” 11 U.S.C. § 1111(b)(1)(B)(ii); In re Moorpark Adventure, 161 B.R. 254, 259 (Bankr. C.D. Cal. 1993); In re 500 Fifth Avenue Associates, 148 B.R. 1010, 1016 (Bankr. S.D. N.Y. 1993); H & M Parmely Farms v. Farmers Home Admin., 127 B.R. 644, 648 (D. S.D. 1990); In re Atlanta West VI, 91 B.R. 620, 624 (Bankr. N.D. GA 1988). Thus, where property is sold pursuant to a §363 sale, the secured creditor has the ability to elect to receive payment in full or to receive the collateral via exercise of credit bid rights. Under a chapter 11 plan, where the property is not being sold, the secured creditor has parallel rights via the right to elect under §1111(b) to have the entire claim remain a lien against the property. However, where the chapter 11 plan calls for sale of the property, conceivably the secured creditor could be left without either the ability to credit bid or the ability to elect to treat the entire claim as secured under §1111(b). In that event, the creditor is left with the argument that a plan which calls for sale of the collateral for less than the amount of the debt in contravention of the secured creditor’s desire to retake the property should not be confirmed (for example, because the plan is not proposed in good faith; the value of the property to be distributed is less than the value of the secured claim (since the creditor’s willingness to take the property in lieu of the debt de facto establishes a higher value); or that the plan is not fair and equitable).

C. OTHER CONSIDERATIONS

Obviously, the contents of a plan are the product of negotiations with a wide range of interested parties: the debtor or the trustee secured creditors, unsecured creditors or creditors’ committees, equity

holders and any purchaser of the assets. The competing, conflicting and overlapping interests of these parties will determine or dictate the contours of the plan, and its ultimate acceptance or rejection by creditors and interest holders.

It is precisely the process of negotiation among interested parties, culminating in a reorganization plan, which constitutes the ultimate procedural safeguard for creditors and interest holders under Chapter 11. The reorganization plan very likely will address a myriad of issues not related to any sale of assets proposed by the plan. For example, disputes with secured creditors may be resolved with the result that a portion of the secured claims are relinquished to free funds for distribution to junior creditor classes who might otherwise not receive distribution on account of their claims. Equity holders similarly may benefit from the plan process, and be able to salvage some portion of their investment through negotiations with senior creditor classes. Burdensome executory contracts or unexpired leases may be modified or rejected as part of the plan, and debt may be de-accelerated to provide breathing room for the reorganizing entity. All of these features, and others, while not directly impacting on the asset sale feature, may impact adversely on the plan confirmation process by engendering opposition to the non-sale related aspects of the plan. Accordingly, the asset purchaser may be faced with unexpected and unacceptable delay or expense. In a true emergency situation, the plan process may present insurmountable obstacles to the asset purchaser to the potential detriment of the debtor unless the court can be convinced to permit the § 363(b) sale.

As the emphasis of these materials is on § 363 sales, a more thorough analysis of the plan process will not be undertaken here. However, a side by side comparison of some of the advantages and disadvantages of a plan versus § 363 sales is attached as **Appendix A**.

V. USE OF HYBRID 363/PLAN STRATEGIES

Employing a hybrid approach to a sale of substantially all a debtor's assets can be a useful strategy. For example, in In re Aladdin Gaming, Inc., BK-S-01-20141-RCJ, the Debtor proposed a sale through a hybrid 363/plan procedure. The Debtor filed a motion to approve sales procedures, including the selection of a purchaser. The process paralleled an auction under § 363, including identification of a stalking horse bidder, providing buyer protections including a break fee, advertisement of the buyer selection "auction", and requiring the exercise of credit bid rights at the buyer selection hearing. However, once the buyer was identified through the selection process, the identity of the buyer was inserted into the (already filed) disclosure statement, with the sale to occur only after confirmation of a plan. The process was designed to combine the competitive aspects of a 363 auction sale with the additional relief afforded through of a reorganization plan.

VI. CONCLUSION

While §363 sales have become common either in advance of, or even in lieu of, plan proceedings in chapter 11 cases, it is submitted that enactment of a confirmed plan remains the goal of a reorganization proceeding. Some relief, such as avoidance of transfer taxes, are theoretically available only through the plan process. However, it is likely that practitioners will continue to rely heavily on the §363 sale process, and attempt to continue to expand the relief requested outside of a plan. To what extent bankruptcy courts may ultimately "push back" on such strategies has yet to be determined.

APPENDIX A
CHAPTER 11 SALES OF ASSETS OUTSIDE
THE ORDINARY COURSE OF BUSINESS⁶

CONSIDERATION	SECTION 363(b) SALE	SALE PURSUANT TO REORGANIZATION PLAN
Timing and Expense	Undeniably faster and less costly (hearing may be conducted after 20 days' notice); lower administrative expense is a certainty.	Slower, more cumbersome process: requires two evidentiary hearings (approval of disclosure statement and plan confirmation) with 25 days' notice each and realistic 60-90 days overall under the best circumstances; higher administrative expense is a certainty.
Buyer Protection, Competitive , Open Bidding	Encouraged by the bankruptcy sale process, although contract can be structured to achieve a reasonable level of buyer protection (e.g., an upset price, a bid cushion, a penalty, a break up fee, or a cost reimbursement provision).	Not likely, although possible via a competing plan or by court order; buyer may be able to offer something unique (other than cash) to assist debtor's reorganization via plan process (this technique may also work with § 363(b) sales).
Comprehensive Resolution of Non-Sale Related Problems	Sale only accomplishes turning properties into cash asset or equivalent [see <u>In re Braniff Airways, Inc.</u> , 700 F.2d 935 (5 th Cir. 1983) (secured creditors could not be forced to vote a portion of their deficiency claim in favor of future plan as requisite to § 363(b) sale)].	Plan typically resolves wide range of issues relating to restructuring of debtor or its finances or debtor's liquidation; more likely to result in return to equity holders and junior creditor classes.
Creditor Rights	Right to Object Credit Bid Rights	Voting Rights Imperative to obtain acceptance, through negotiation and plan formulation process

⁶ Chart prepared in connection with Comparison of Sales of Assets Under Chapter 11 Pursuant to Section 363 and or a Plan of Reorganization by Robert M. Fishman, Esq. and James Patrick Shea, Esq.

CONSIDERATION	SECTION 363(b) SALE	SALE PURSUANT TO REORGANIZATION PLAN
		<p>the requisite level of creditor approvals for each class under the proposed plan or to meet the standards of the cram-down provisions of the Bankruptcy Code (§ 1129(b)(1) and (2)).</p> <p>Creditor can choose to have its claim treated as a secured claim pursuant to 11 U.S.C. § 1111(b). Not available under § 363 sale or sale under a plan.</p>
Taxation Issues	<p>a) If sale is coupled with down grading or cancellation of debt owed to purchaser, debtor and creditor may have tax consequences.</p> <p>b) Net operating losses do not follow the sale of assets</p> <p>c) State income tax may be owed on sale assets, particularly if in the nature of a liquidation sale (question is one of state law).</p> <p>d) Although no statutory authority for avoidance of transfer taxes, many sale motions and orders treat sale “as” a sale pursuant to a plan, effectively avoiding such taxes.</p>	<p>a) and b): <u>See</u> discussion regarding taxation issues in context of § 363 (b) sales.</p> <p>c) <u>See</u> discussion regarding taxation issues in context of § 363(b) sales. <u>See also</u> § 1146(d): court may authorize plan proponent to inquire of state or local taxation units concerning tax effects of proposed plan within 270 days of the request (determination limited to questions of law).</p> <p>d) Transfer to a third party pursuant to a confirmed plan may be exempt under § 1146(c) from local transfer taxes. <u>See, City of New York v. Jacoby-Bender, Inc. (In Re Jacoby-Bender, Inc).</u>, 758 F. 2d 840 (2d Cir. 1985) (real property transfer tax exempt).</p>
Bankruptcy Court Retained Jurisdiction	Must be specifically provided for in purchase contract and sale order if desired for dispute resolution relating to asset sale.	Typically part of the plan process until substantial consummation of the plan, often afterward as provided by plan.
Ability to Restructure or Assume Executory	Can be a two-step process to transfer to buyer (motion to assume and assign	Greater flexibility to deal with terms of executory contracts and unexpired leases.

CONSIDERATION	SECTION 363(b) SALE	SALE PURSUANT TO REORGANIZATION PLAN
Contracts and Unexpired Leases	coupled with motion to sell); limited (if any) ability to restructure contract	
Creditor Resistance to Sale	Interested parties are only entitled to notice and opportunity to object; purchaser probably is not an interested party and cannot respond directly to objections (<u>see Competitive Open Bidding supra.</u>).	Not as likely to be encountered if pre-plan negotiations with major creditors result in plan/sale consensus; rejection of plan by creditor groups or possibility of a competing plan must be considered.
Finality of Court Order	Appeal (by interested parties only) of sale order may not be moot unless stay of sale is obtained; good faith purchaser protected (§ 363(m); Bankr. Rule 8005).	Rule stated with regard to § 363(b) sales may apply to transfers pursuant to a confirmed plan [<u>see In re Bleaufontaine, Inc., 634 F.2d 1383, 1389 n. 11 (5th Cir. 1981).</u>].
Best Price for Assets	Relative speed of § 363(b) sale may be undermine obtaining best price for assets or, in case of “emergency” may enhance it (<u>see Timing and Expense supra.</u>).	Allows longer period of time for assets to be exposed to market place—or to deteriorate in value (<u>see Timing and Expense supra.</u>).
Release of Guarantor	Not applicable.	Possible, particularly if the plan draws no objections.
Contracts with Key Employees or Insiders	Sale may not be approved by the court as being in bad faith or buyer may be disqualified if enters into contract with key employees or insiders: disclosure is a necessity; such arrangements with insiders surely will invite greater scrutiny by creditors and may result in contentions that the sale is motivated by the self-interests of the insiders [<u>see In re Industrial Valley</u>	Contractual arrangements with key employees and insiders should be disclosed but, once disclosed, ordinarily would not rise to the level of grounds for rejection of the plan absent creditor opposition.

CONSIDERATION	SECTION 363(b) SALE	SALE PURSUANT TO REORGANIZATION PLAN
	<u>Refrig. & Air Cond. Supplies, Inc., 77</u> Bankr. 15, 22 (Bankr. E.D. Pa. 1987)].	