Concurrent Session

Current Controversies in Bankruptcy Sales

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Educational Materials

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Conflicting results--the approval of sales under Section 363 and disapproval of Sub Rosa plans of reorganization

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Key Issue for Sub Rosa Concerns – When does §363 sale infringe on §1129 rights

- Overriding principles of the United States Bankruptcy Code (the "Code") in general, and Chapter 11 in particular, are the non-discriminatory treatment of stakeholders and opportunity to be heard. Section 1129, governing the plan confirmation process, sets out the process under which any interested party can raise issues and be heard. Courts are quite sensitive to scenarios where there is even the appearance of favoritism among parties-in-interest and generally require clear demonstration of the business necessity of such arrangements. Since that necessity must typically be expressed in terms of value to be distributed to stakeholders upon the consummation of a plan of reorganization, the courts place special emphasis on preserving the rights of parties until they can be dealt with in the plan process.

- While the Code overtly contemplates a sale of assets of the debtor prior to confirmation of a plan in §363, the section does not supersede the overriding principles of fairness. Courts recognize that the interaction of buyer and seller in anticipation of a sale under §363 is a fertile ground for creative deal making and parties are often unavoidably conflicted in their views of an acceptable sale agreement.

- As a means to prevent a circumvention of the Code principles, courts have developed through case law a set of standards to which the court will refer to determine if a sale under §363 inappropriately deprives the interested parties of rights present in the confirmation process (commonly known as a 'sub rosa plan') or if it should be permitted to move forward.

Overview of §363 vs. §1129

- §363 of the Code authorizes the debtor to sell assets out of the ordinary course of business at any point in the bankruptcy case, upon obtaining the bankruptcy court's approval. However, §1129 requires that before the court approves a plan of reorganization, it must ascertain that the plan complies with the usual priorities, absent creditor consent to a plan deviating from those priorities.
- While the vast majority of sales under §363 are asset sales, in most cases the buyer will identify various key vendors/relationships that it perceives to be essential to the going concern value of the business and will either assume these obligations or make separate arrangements with those parties and adjust the purchase bid accordingly. It is recognized that these creditor parties are being treated differently than creditors of the same class whose obligations are not being assumed; however, a more sophisticated test is necessary if §363 is to have any real meaning.
- The focus then turns to an analysis of the value provided by the sale and the rights of which interested parties are being deprived. In cases where courts have objected to a sale as a sub rosa plan of reorganization, particular attention is given to sale terms dictating outcomes that are normally handled under §1129, with disclosure and voting under §1129(a)(8) or via judicial force in §1129 (b) such as distributions to insiders, releases, or the ability to challenge the allocation of sale value between debtor and non-debtor assets.
- Conversely, courts agree that if a sale under §363 is effectively monetizing non-cash assets of the debtor, certain otherwise discriminatory treatment (e.g. assumption of only certain vendor claims, assumption of only certain warranty claims, or the assumption of only certain executory contracts) is necessary and appropriate to deliver maximum value to the remaining constituents in the eventual plan of reorganization and the substitution of one asset (cash) for another (property) is proper.

Precedents relating to §363 sales and §1129 rights

- Although courts regularly indicate the impermissibility of sub rosa plans, they do not bar all plans that make §1129 determinations in the §363 sale. The sale may go through, but only if an appropriate consideration is given to the requirements of plan confirmation.
- In *Comm. of Equity Sec. Holders v. Lionel Corp* (2d Cir. 1983), the Second Circuit found §363 sales of substantially all of the debtor's assets to be appropriate if a judge finds "a good business reason to grant such an application". The Court noted:
  - "[I]t is easy to sympathize with the desire of a bankruptcy court to expedite bankruptcy reorganization proceedings for they are frequently protracted. "**The need for expedition, however, is not a justification for abandoning proper standards."**
  - "In fashioning its findings, a bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, he should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike."
- In 2007, the Second Circuit, in *In re Iridium Operating LLC*, revisiting the issue noted:
  - "[W]hether a particular settlement's distribution scheme complies with the Code's priority scheme must be the most important factor for the bankruptcy court to consider when determining whether a settlement is 'fair and equitable'...The court must be certain that parties to a settlement have not employed a settlement as a means to avoid the priority structures of the Bankruptcy Code."

Precedents relating to §363 sales and §1129 rights (cont'd.)

- An explicit exposition of the courts' concerns appears *In re Gulf Coast Oil Corp.*, 2009 WL 361741 (Bankr. S.D. Tex. 2/11/09)
  - "It would be very helpful if the Fifth Circuit were to take another look at the boundaries of §363(b) sales to provide more guidance to the bankruptcy courts in the circuit. Under the existing jurisprudence:
    - The debtor in possession or trustee in a chapter 11 case must consider its fiduciary duties to all creditors and interest holders before seeking approval of a transaction under § 363(b);
    - The movant must establish a business justification for the transaction and the bankruptcy court must conclude, from the evidence, that the movant satisfied its fiduciary obligations and established a valid business justification;
    - A sale, use, or lease of property under §363(b) is not *per se* prohibited even though it purports to sell all, or virtually all, of the property of the estate, but such sales (or proposed sales of the crown jewel assets of the estate) are subject to special scrutiny;
    - Parties that oppose §363(b) transactions on the basis that they constitute a *sub rosa* chapter 11 plan must articulate the specific rights that they contend are denied by the transaction;
    - Although the bankruptcy court need not turn every §363(b) hearing into a mini-confirmation hearing, the bankruptcy court must not authorize a §363(b) transaction if the transaction would effectively evade the "carefully crafted scheme" of the chapter 11 plan confirmation process, such as by denying §1125, 1126, 1129(a)(7), and 1129(b)(2) rights; and
    - If the bankruptcy court concludes that such rights are denied, then the bankruptcy court can only approve the transaction if it fashions an appropriate protective measure modeled on those which would attend a reorganization plan.

Supporting a §363 Sale

When a sale under §363 encompassing substantially all of the debtor's assets (or, as certain courts have emphasized, the 'crown jewels') is proposed, proper structuring of the transaction and factual support are critical to maximize the opportunity for court approval in the face of objections hinging on sub rosa considerations.

- **Valuation** – The starting point for all transactions is a proper assessment of value. The context of that assessment expands in a §363 sale to address the issue of the future potential of the assets being sold. A compelling reason for court approval of the sale is that the assets will prospectively decrease in value over the time necessary to complete the plan process under §1129, thereby diminishing the recovery for creditors.
- **Class consent** – Somewhat obvious, but not to be overlooked, the more explicit the support for the sale from creditor constituencies, the more likely the court will get comfortable that §1129 considerations are not a material impediment to the sale.
- **Auction Process** – A full and fair auction process is the litmus test for the value produced in the sale. In order to overcome objections, particularly from those constituencies apparently 'out of the money', the auction should be structured in a way that ensures the assets are adequately marketed and provides clear opportunity for likely interested parties to bid on a level playing field. Consider Chrysler and GM exceptions to this rule rather than a new paradigm.
- **Distribution of Value** – Once it is established that it is fair to assume market value will be achieved at auction, the potential conflicts with §1129 center around the distribution of that value. Distribution occurs in two ways: (i) by the buyer's assumption of certain pre- or post-petition obligations; and (ii) by the allotment of the consideration paid in the sale. The issue of the buyer's assumption is complex and is more likely to be controversial; a showing that the assumed obligations (or the holders of those obligations) are integral to the future success of the enterprise represented by the assets should be part of the support for a §363 sale, particularly where there is a split of assumed/non-assumed claims within given creditor classes. The issue of allocation of consideration is even more closely scrutinized by courts and efforts to use the §363 process to deliver value to creditors outside of a plan (as opposed to escrowing the consideration and allocating it in a liquidating plan) is almost universally frowned upon.

Overview Comparison of Chrysler, GM, and Coyotes

	Chrysler	General Motors	Phoenix Coyotes
LTM Revenue	$56 billion	$149 billion	$66 million (per Forbes estimate)
Operating Status of Enterprise	At risk in the short-term	At risk in the short-term	Not at risk
Valuation Completed	Yes; valuation only completed by debtor; creditors not provided enough time	Yes; valuation was done by the debtor, secured creditors were paid in full so therefore unconcerned, and subordinated debt did not have time	Yes; valuations completed by multiple parties
Consent From Lenders	Yes; potentially tainted due to U.S. Government intervention	Yes, but with Chrysler precedent firmly in mind	Yes; creditors except for Moyes and Gretzky were in favor of the NHL's bid (which paid them in full)
Market Test Completed	Partially; the company was marketed, but only with certain liabilities attached	Partially; similar to Chrysler, the company could only be bid on with certain liabilities attached	Yes; there was an open bidding forum, but subject to the right of the NHL to approve of the new owner
Absolute Priority Followed for Distributions	Technically yes, provided one accepts the concept of new value as exception	Technically yes, provided one accepts the concept of new value as exception	No; Moyes and Gretzky claims were not treated as others in the same class

The Chrysler Decision

- The §363 sale of the bulk of the Chrysler assets determined the core of the reorganization, but without adequately valuing the assets and/or market testing the sale itself. Additionally, the buyers were principally existing creditors leveraging their claims into interests in New Chrysler without reference to the rules of absolute priority under the Code.
    - Chrysler did present a valuation to the court, with the liquidation value centered on $2 billion, although with a range that went substantially higher. However, the court did not give the objecting creditors time to present an alternative valuation from their experts. The court made a further determination that the value of the assets was decreasing and there was a high probability the enterprise could not continue to operate long enough to get to the end of a reorganization plan process.
    - Chrysler and the U.S. Government asked the court to only permit the firm to be marketed *with* multiple pre-bankruptcy claims on Chrysler intact, including the United Automotive Workers' retiree claims (including past employees who would provide no benefit to New Chrysler). The court turned down the objecting creditors' request to market the assets alone.
    - The court was made aware that holders of two-thirds of the dollar amount of the senior creditor class had agreed to support the sale. While the creditor class initially objected in negotiations with the U.S. Treasury, four major creditors — Citigroup, J.P. Morgan Chase, Goldman Sachs, and Morgan Stanley — holding 70% of the dollar amount of the claims, eventually acceded to the $2 billion recovery.

GM Follows the Chrysler Precedent

- The GM process followed the same §363 sale template as seen in the Chrysler case.
    - As in Chrysler, the §363 sale was not to a third-party without existing interests and bidders had to agree to the retiree settlement plan negotiated by the U.S. Government and GM. Alternative scenarios and their impact on creditor recoveries were not vigorously pursued.
    - Since GM's senior-most creditors were paid in full from DIP facility proceeds provided by the U.S. Treasury, producing a result closer to absolute priority rules, the court invoked the Chrysler precedent as it proceeded to overrule strenuous objections from interested parties.
        - "[T]he *sub rosa* plan contention was squarely raised, and rejected, in *Chrysler,* which is directly on point and conclusive here."
        - "[W]e have here a hugely important additional fact. The [Second] Circuit affirmed *Chrysler* … 'substantially for the reasons stated in the opinion below.'" "[I]t is not just that the Court feels that it *should* follow *Chrysler.* It *must* follow *Chrysler.* The Second Circuit's *Chrysler* affirmance … is controlling authority."

Coyotes - Court Declines To Apply Chrysler/GM Precedent

- The Phoenix Coyotes filed for protection under Chapter 11 principally for the purpose of effectuating a sale of the franchise. The ownership group had engaged in discussions with a potential buyer and intended to use §363 to accomplish a swift transfer and, apparently, to force the NHL to approve a buyer about whom the NHL had reservations and would likely relocate the franchise.
- While arguing the primacy of the NHL's internal rules on relocation and ownership transfer, the NHL also sought to protect its position by participating in the §363 process and submitting a bid, albeit at a lesser valuation than the debtor's desired purchaser.
- The court overruled the NHL's argument for using the Chrysler precedent to speed the franchise's exit from bankruptcy via a §363 sale, citing the portions of the proposed sale agreement which deprived certain creditors, most notably the unsecured creditor claims of the principal equity holder and a competing prospective purchaser, of equal recovery of those in the same class or, for that matter, any recovery at all.
  - "It seems obvious to this court [that] the apparent practical effect of the NHL's bid is to pay all creditors in full except, the Moyes and Gretzky claimants, there has been no determination that the Moyes and Gretzky claims are not 'legitimate creditors.' It would be inherently unjust to deprive them of their rightful possible share of the proceeds."
  - Judge Baum noted "Because there is a real danger that a §363 sale might deprive parties of substantial rights inherent in the plan confirmation process, sales of substantial portions of a debtor's assets under § 363 must be scrutinized closely by the court." (emphasis added)
- In short, the court found no compelling reason to accommodate a sale outside of a plan where the value of the asset was not proven to be at risk and rights of prominent parties would be irrevocably impaired without application of §1129 protections.

Distinguishing Chrysler/GM and Coyotes

- The automobile industry in the United States is viewed as the backbone of domestic manufacturing and job creation. The U.S. Government had both a monetary interest and a political interest in driving a result it believed to be acceptable.
- Chrysler and GM were each at risk of entering a death spiral as consumers possessed of a wide variety of alternative choices and exhibited a dramatic unwillingness to buy vehicles where warranty coverage and availability of replacement parts appeared to be in question. The complexity of the businesses supported the view that a plan confirmation process would be lengthy and contentious and asset values would be greatly damaged over time.
- The sheer size of these enterprises, and the treatment of legacy liabilities necessary to assure the cooperation of the unionized work force, severely restricted the scope of potential purchasers.
- The existence of the Phoenix Coyotes was not essential to survival of the NHL; moreover, the NHL possessed adequate tools to keep the franchise operating (through additional loans, if necessary) until the completion of a plan process. Additionally, the Coyotes franchise – in relative terms - is not a complex or far reaching asset. Further, the best interests of the NHL were difficult to reconcile with the best interests of the Coyotes' creditors as whole.
- The NHL retained ultimate control over the disposition of the franchise, whether in a plan or a §363 process making it difficult to craft a process at any stage that could attract outside parties. Conceding that point to the NHL, the court focused on what it perceived to be the fair and equitable treatment of material stakeholders (Moyes and Gretzky) and ultimately allowed a restructured §363 sale to proceed with the NHL as purchaser.

Case Summaries

Chrysler Bankruptcy §363 Sale Overview

- "New Chrysler" purchased nearly all of "Old Chrysler's" assets and assumed select liabilities in exchange for $2bn of cash, all of which was distributed to senior secured lenders based on priority **(this amounts to a 29% recovery on the prepetition senior secured debt of $6.9bn)**.
- Daimler, a minority shareholder, waived its portion of the $2bn second lien claim and settled its guaranty obligation to the PCBG by paying $600mm to New Chrysler's pension fund.
- Cerberus waived its portion of the $2bn second lien claim and forfeited its entire equity position.
- "New Chrysler" established an independent trust (VEBA) that will provide health care benefits to current and past employees. VEBA was funded by a a $4.6bn 9% note with a 13-year maturity, as well as a 55% equity stake in "New Chrysler". VEBA was also given the right to appoint one director to the board of "New Chrysler."
- The U.S. Treasury received an 8% equity stake in "New Chrysler" and the right to appoint four directors.
- The federal government of Canada and the provincial government of Ontario received a 2% equity stake in "New Chrysler" and the right to appoint one director.
- In addition to the its lending to "Old Chrysler," the U.S. Treasury provided $6.0bn in exit financing.
- Fiat received its equity position without making any cash investment in the business.

Old Chrysler		New Chrysler	
Secured Debt		**Secured Debt**	
First Lien	$ 6.9bn		
Second Lien (prior shareholders)	2.0bn		
Third Lien (government)	4.5bn	Government	$6.0bn
	13.4bn		6.0bn
Unsecured Debt		**Unsecured Debt**	
TARP Loan	$ 4.0bn	Trade Debt	$5.3bn
Trade Debt	5.3bn	Warranty & Dealer	4.0bn
Warranty & Dealer	4.0bn	Underfunded Pensions	3.5bn
Underfunded Pensions	3.5bn	VEBA Obligations	4.6bn
VEBA Obligations	10.0bn		17.4bn
	26.8bn		
		Shareholders' Equity	
		VEBA	55%
		Fiat	35%
		US Treasury	8%
		Canadian Government	2%

GM Bankruptcy §363 Sale Overview

- The U.S. and Canadian governments acquired the majority of GM's assets through a credit bid of their senior secured debt.
- In exchange for providing prepetition and DIP financing, the U.S. government received $6.7bn in secured debt, $2.1bn in preferred shares, and a 60.8% equity stake in "NewGM."
- The federal government of Canada and the provincial government of Ontario, which provided $9.5bn in DIP financing, received $1.3bn in debt, $0.4bn in preferred shares, and an 11.7% equity stake in "NewGM."
- "Old GM's" $6bn of prepetition senior secured debt was paid in full out of proceeds from the DIP facility.
- Bond holders' unsecured claims of $27.1bn remained with GM Liquidation Co.
- GM Liquidation Co. received 10% equity in "NewGM".
- "NewGM" created an independent trust (VEBA) for retiree health care benefits that was funded by a $2.5bn note and $6.5bn in preferred stock.. VEBA also received a 17.5% equity stake in "NewGM," and warrants to purchase another 2.5%. VEBA will have the right to select one director, but will have no other governance rights.
- Significant operations that were not sold to "NewGM" included GMAC (51%), Allison Transmission, Suzuki, Isuzu, Fuji Heavy Industries, Electromotive Division, AC Delco, HUMMER, and Strasbourg Powertrain Facility.

Old GM		New GM	
Secured Debt		**Secured Debt**	
Prepetition Secured Debt*	$6.0bn	U.S. Treasury	$7.1bn
U.S. Treasury (prepetition)	19.8bn	Canada	1.3bn
U.S. Treasury (DIP)	33.0bn		8.4bn
Canada	9.5bn		
	68.3bn	**Unsecured Debt (excl. trade/ other)**	
		U.S. VEBA Note	$2.5bn
Unsecured Debt (excl. trade/other)		Canada VEBA Note	0.7bn
Unsecured Notes	$27.1bn		3.2bn
VEBA	23.3bn		
	50.4bn	**Preferred Equity**	
		VEBA Pref.	6.5bn
		U.S. Treasury	2.1bn
		Canada	0.4bn
			9.0bn
		Shareholders' Equity	
		U.S. Treasury	60.8%
		VEBA	17.5%
		Canada	11.7%
		Old GM Estate	10.0%

Phoenix Coyotes Bankruptcy §363 Sale Overview

- The Coyotes had prepetition assets of $77mm and prepetition liabilities of $237mm. The Coyotes' capital structure consist primarily of the following:
  - $23.6 million of advanced television revenues from the National Hockey League ("NHL")
  - $13.4 million senior secured line of credit from the NHL
  - $75 million secured loan facility, consisting of a $20 million senior secured promissory note and a $55 million second lien facility
  - $95 million unsecured revolver from Jerry Moyes, owner of the Phoenix Coyotes
- Multiple parties indicated interest in the Coyotes; however, two parties submitted bids prior to the initial auction deadline, both which were ultimately rejected by the court.
  - Jim Balsillie's group made a $212.5mm bid for the team conditional on relocation to Hamilton, Ontario. This bid was rejected largely because the court accepted the NHL's claim to sole authority of who owns NHL teams and the league Board of Governors had rejected Balsillie's application for ownership.
  - The NHL made a bid for $140mm that was rejected on §1129 grounds because its offer would pay all creditors in full, except for the team's current owner, Jerry Moyes (claiming approximately $104.4mm), and coach, Wayne Gretzky (claiming $8mm in deferred compensation and $14.5mm upon a change in management).
- The NHL ultimately acquired the Coyotes through a §363 sale, bidding $128.4mm ($11.4mm cash and $117mm in assumed senior debt) and agreeing to address the entire unsecured class (including Moyes and Gretzky) separately.

Clear as Mud: How the *Clear Channel* Decision has Impacted Bankruptcy Court's Application of 11 U.S.C. § 363(f) & (m)

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Clear Channel: 9th Circuit B.A.P. Decision

Clear Channel – The Bankruptcy Court Decision

- Facts
  - DB held a first-priority lien on PW's single asset, real estate located in Burbank, CA. 391 B.R. at 31.
  - DB served as the stalking horse bidder, with a price set (in the event of no qualified overbidder) equivalent to the amount PW owed DB, "plus a senior lien, less the negotiated minimum over bid amount." Id. at 31 & n.4.
  - Clear Channel, holding a $2.5 million junior lien, opposed the trustee's sale motion on the grounds that § 363(f) did not apply and the sale could not be executed free and clear of its lien. Id. at 30, 32.
  - The court authorized the sale, which resulted in no qualified overbids, and confirmed the sale to DB. Id. at 32.
  - DB's initial credit bid was sufficient to cover the sale price, so "there were no [cash] proceeds to which Clear Channel's lien could attach," leading Clear Channel to appeal the stripping of its lien. Id.

Clear Channel (cont.) – 11 U.S.C. § 363(m)

- B.A.P. Analysis of Mootness
  - Clear Channel's appeal was not constitutionally moot because it was "still possible to fashion some relief." 391 B.R. at 34.
  - Although review of the sale itself was equitably moot, review of the lien-stripping was not because of "the relative ease with which" the court could grant Clear Channel's requested relief. Id. at 35.
  - In 2009, the Fifth Circuit concluded that secured creditors' objections to the way a reorganization plan affected their rights under the absolute priority rule were not equitably moot. In re Pacific Lumber Co., 584 F.3d 229, 243-44. The only party that would be negatively affected by reversal of the confirmation in this respect would have been the new owners of the reorganized debtors, not third parties. Id.
  - This could be viewed similarly to the *Clear Channel* court's determination that consideration of the lien-stripping order was not equitably moot because of the ease with which Clear Channel's junior lien could be reinstated upon reversal without affecting the sale as a whole.)

Clear Channel (cont.) – 11 U.S.C. § 363(m)

- B.A.P. Analysis of Mootness (cont.)
  - Then the panel addressed statutory mootness under § 363(m)
    - Clear Channel's failure to obtain a stay of sale and the bankruptcy court's finding that DB purchased in good faith meant review of the sale was moot under § 363(m). 391 B.R. at 35.
    - The appeal of the lien-stripping under § 363(f) was not moot, however, because the panel concluded § 363(m) did not apply; § 363(m) only refers to the sale and lease provisions of § 363(b) and (c), not the lien-stripping provisions of § 363(f). Id.
  - **Key to Holding**: § 363(m) applies only to the sale itself and not to lien stripping under § 363(f).

Clear Channel (cont.) – 11 U.S.C. § 363(f)(3)

- B.A.P. Analysis of Free & Clear under § 363(f)(3)
  - Trustee argued that § 363(f)(3)'s "aggregate value of all liens" language refers to economic, rather than face, value. 391 B.R. at 39.
  - Trustee and DB noted that "conventional bankruptcy wisdom, supported by § 506(a)," is that the amount of a "secured claim can never exceed the value of the property securing the claim." Id.
  - The Bankruptcy Code establishes that secured claims are liens, so § 363(f)(3) could be read as allowing the free and clear sale of junior "out-of-the-money" liens – those that are not supported by the collateral's value. Id. at 40.
  - The panel joined other courts that rejected this reading, because it "expands § 363(f)(3) too far" and is inconsistent with the context of the provision; Congress "would have worded the paragraph very differently" had it intended such a reading. Id.
  - In rejecting the § 506(a) approach to determining the "aggregate value of all liens," the B.A.P. stated that under that approach, § 363(f)(3) would never apply when "claims exceed the value of the collateral that secures them," because the sum of all allowed secured claims could only equal the sale price, not exceed it as required by the statute. Id.
  - **Key to Holding**: § 363(f)(3) does not apply unless collateral is being sold for enough to cover all liens.

Clear Channel (cont.) – 11 U.S.C. § 363(f)(5)

- B.A.P. Analysis of Free & Clear Under § 363(f)(5)
  - The issue of whether § 363(f)(5) applied was the "main dispute" in the *Clear Channel* case. 391 B.R. at 38, 41.
  - The panel rejected the bankruptcy court's ruling that § 363(f)(5) had a plain meaning and therefore considered the "compelling interpretations" the parties suggested. Id. at 41.
  - The panel first established that the term "interest" in § 363(f)(5) includes liens such as the one Clear Channel held, because the term "any interest" in § 363(f) includes § 363(f)(3)'s language "such interest is a lien" and the Bankruptcy Code definition of "lien" includes an "interest in property." Id. at 42.
  - Moving on to § 363(f)(5)'s reference to compelling satisfaction, the panel "assume[d]" that only legal and equitable proceedings wherein the interest-holder can be forced to "take *less* than the value of the claim secured by the interest" qualified and noted that other courts agreed with this position, because a full-payment requirement would make § 363(f)(5) redundant when considered alongside § 363(f)(3). Id. at 42-43.

Clear Channel (cont.) – 11 U.S.C. § 363(f)(5) (cont.)

- B.A.P. Analysis of Free & Clear Under § 363(f)(5) (cont.)
  - The panel held that bankruptcy courts applying § 363(f)(5) "must make a finding of the existence of" a qualifying legal or equitable procedure and "the trustee must demonstrate how satisfaction of the lien could be compelled." Id. at 45 (quotations omitted).
  - Although the Trustee was able to cite various cases finding that the cramdown procedure of § 1129(b)(2)(A) satisfied § 363(f)(5), the panel rejected that premise because it "uses circular reasoning" and held that the § 1129(b)(2)(A) cramdown was not a legal or equitable proceeding in which satisfaction of an interest can be compelled. Id. at 46.
  - **Key to Holding**: § 363(f)(5) does not apply (although this was remanded) because cramdown under §1129 is not a legal or equitable proceeding to which it applies.

Subsequent History: Appellate Practice

Within the 9th Circuit

- *In re Jolan, Inc.*, 403 B.R. 866 (Bankr. W.D. Wash. 2009)
  - Chapter 7 Trustee moved for authority to sell Debtor's personal property and tradename to the Debtor's landlord, to whom the Debtor owed rent. 403 B.R. at 867.
  - Debtor and Evergreen Bank, a secured second lienholder, cited *Clear Channel* for the premise that the court could not authorize a sale free and clear over the secured creditor's objection unless Evergreen's claim was paid in full. Id.
  - Concluding that the price the Trustee and Landlord agreed upon was not established as "fair market value" and would not satisfy all liens, the court set out to determine whether § 363(f)(5) would allow a free and clear sale by way of auction. Id. at 868.

Within the 9th Circuit (cont.)

- *In re Jolan, Inc.*, 403 B.R. 866 (Bankr. W.D. Wash. 2009) (cont.)
  - The court first summarized *Clear Channel*, noting that the B.A.P.'s ruling that the § 1129(b)(2)(A) cramdown did not satisfy § 363(f)(5) was in disagreement "with courts outside this circuit holding to the contrary." 403 B.R. at 869.
  - Next, the court noted the fact that the panel did not address any "non-contractual mechanisms" that might compel satisfaction pursuant to § 363(f)(5) and "exercised its prerogative to limit its ruling to the arguments presented by the parties" rather than search for a ground on which to apply the section. Id.
  - Finally, the court distinguished *Clear Channel* and applied § 363(f)(5) in authorizing the auction, because there were numerous "legal and equitable proceedings [under federal or state law] in Washington in which a junior lienholder could be compelled to accept a money satisfaction," including:

Within the 9th Circuit (cont.)

- *In re Jolan, Inc.*, 403 B.R. 866 (Bankr. W.D. Wash. 2009) (cont.)
  - A senior secured party's disposition of collateral through the U.C.C.'s default remedies provisions of Article 9
  - State receivership law that allows for disposition of property free and clear of liens
  - Liquidation of a probate estate
  - A personal property tax sale
  - A federal tax lien sale
- 403 B.R. at 869-70.

Within the 9th Circuit (cont.)

- *Antelope Valley Health Care District v. Citadel Properties Lancaster, LLC*, Nos. 08-55045, 08-55254 (9th Cir.)
  - NOT a bankruptcy case; actually a contract dispute
  - Appeal from U.S. Dist. Ct. for C.D. Cal., which awarded Antelope Valley specific performance and denied Citadel's request for relief under the contract
  - Appellee's Answering Brief
    - In arguing that Citadel's post-trial sale of the underlying interest rendered the appeal moot, Antelope Valley relied on *Clear Channel*.
    - Courts have applied "equitable mootness" if the appellant "failed to seek a stay" and changes in circumstances "ma[d]e it inequitable for the court" to hear the appeal.
  - Opinion, 322 Fed. App'x 523 (9th Cir. 2009) (unpublished)
    - The court rejected Antelope Valley's contention and held that the appeal was not moot, because the court could rescind the conveyance.
    - The opinion contains no discussion of either equitable mootness or *Clear Channel*.

Beyond the 9th Circuit

- *Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC (In re Nashville Senior Living, LLC)*, 407 B.R. 222 (B.A.P. 6th Cir. 2009)
  - Debtors, who owned 60% interest in properties with other tenants-in-common, defaulted on obligations to GE and filed Chapter 11 petition. 407 B.R. at 225.
  - Debtors entered into an agreement to sell properties under § 363(b), moved bankruptcy court for authorization to sell to a stalking horse bidder, and commenced adversary proceeding to obtain permission to sell other owners' interest pursuant to § 363(h). Id. at 226.
  - Bankruptcy court approved the sale over the objections of the tenants-in-common and the Official Committees of Unsecured Creditors. Id.
  - The Committees filed a notice of appeal and sought stays pending appeal in both proceedings, but the court denied both. Id.
  - The Debtors filed a notice of sale the same day the Committees sought an emergency stay with the B.A.P., which denied the Committees' motion. Id.

Beyond the 9th Circuit (cont.)

- *Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC (In re Nashville Senior Living, LLC)*, 407 B.R. 222 (B.A.P. 6th Cir. 2009) (cont.)
  - The Debtors argued that their sale rendered the Committees' appeal moot under § 363(m), but the Committees contended that § 363(m) did not apply to sales of co-owners' interests under § 363(h). 407 B.R. at 226-27.
  - Noting that the Sixth Circuit does not subscribe to a narrow interpretation of
  - § 363(m) such as the one for which the Committees advocated, the panel held that applying an exception to § 363(m) because a portion of the sale came under § 363(h) would undermine § 363's purpose of protecting sales in bankruptcy. Id. at 230.
  - The panel concluded the appeal was moot, because the sale of the non-debtors' interests was vital to the sale and could not be challenged without challenging the sale as a whole. Id.

Beyond the 9th Circuit (cont.)

- *Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC (In re Nashville Senior Living, LLC)*, 407 B.R. 222 (B.A.P. 6th Cir. 2009) (cont.)
  - Then the B.A.P. turned its eye to *Clear Channel*, which the Committees had relied upon in their advocacy of the narrow, "plain meaning" approach to
  - § 363(m). 407 B.R. at 230-31.
  - The panel listed numerous problems with the *Clear Channel* decision making it "an aberration in well-settled bankruptcy jurisprudence":
    - The Ninth Circuit B.A.P. cited no case law for its conclusion that § 363(m) did not apply to the lien-stripping of § 363(f). Id. at 231.
    - The "overwhelming weight of authority" existing at the time *Clear Channel* came down held that § 363(m) does apply to § 363(f). Id. (citing eight cases from seven circuits).
    - The *Clear Channel* panel ignored a 1997 Ninth Circuit case applying § 363(m) to
    - § 363(f). Id. (citing In re Robert L. Helms Const. & Dev. Co., 110 F.3d 1470 (9th Cir. 1997)).
  - The B.A.P. also distinguished *Clear Channel*, which involved a § 363(f) free and clear sale rather than a § 363(h) co-owners' interest sale. Id.

Beyond the 9th Circuit (cont.)

- *In re Chrysler, LLC*, No. 09-2311-bk (2nd Cir.)
  - Appeal from Bankruptcy Court for S.D.N.Y. (In re Old Carco, LLC)
    - The Indiana Pensioners had relied on *Clear Channel* in their Corrected Objection to Debtor's Motion for Order Authorizing Sale to argue that §§ 363(f)(3) & (f)(5) did not apply. According to the filing, which quoted *Clear Channel*, "most courts . . . hold that 'greater than the aggregate value of all liens' means the sale must be for more than the entire debt asserted against the property" for § 363(f)(3) to apply. The creditors argued the Debtor had failed to establish the value of the collateral in this case. In a footnote that cited *Clear Channel*, the creditors also claimed § 363(f)(5) did not apply.
    - In its opinion granting authority to sell (405 B.R. 84), the bankruptcy court concluded that the creditors' agent had consented to the sale and, therefore, § 363(f)(2) applied.
    - As a result, the court did not address the creditors' §§ 363(f)(3) & (f)(5) arguments or the authority of *Clear Channel*.

Beyond the 9th Circuit (cont.)

- *In re Chrysler, LLC*, No. 09-2311-bk (2nd Cir.) (cont.)
  - Debtor/appellee's Brief
    - Recognized that bankruptcy court authorized sale despite appellant's suggestion for the court to construe § 363(f)(3) according to *Clear Channel*.
    - Argued that § 363(f)(3) would apply even if *Clear Channel* approach controlled, because the purchase price exceeded any calculation of value of the liens.
  - Opinion, 576 F.3d 108 (2nd Cir. 2009)
    - Concluded bankruptcy court correctly found that the creditors (through an agent) consented to the sale and § 363(f)(2) applied.
    - Did not discuss the Debtor's contention that § 363(f)(3) applied even if *Clear Channel* controlled.
  - *Caveat: Supreme Court vacated the opinion (130 S.Ct. 105 (2009)), thus rendering the appeal moot, as the Second Circuit noted in a subsequent memorandum opinion, 592 F.3d 370.*

Beyond the 9th Circuit (cont.)

- *In re Philadelphia Newspapers, LLC*, No. 09-4266 (3rd Cir.)
  - Appeal from U.S. Dist. Ct. for E.D. Pa.'s reversal of bankruptcy court's authorization of § 1123 sale procedures that allowed for credit bidding
  - Appellant's Brief
    - Used *Clear Channel* to support assertion that § 1129(b)(2)(A) cramdown provisions do not authorize a sale without satisfying the rest of Ch. 11's plan confirmation procedure.
    - Argued that the district court incorrectly concluded § 1129(b)(2)(A)(iii) could be separated from the remainder of § 1129 to preclude credit bidding, similar to how the bankruptcy court in Clear Channel incorrectly concluded § 1129(b)(2)(A) could be used to apply § 363(f)(5) and permit a free and clear sale.
  - Opinion (March 22, 2010)
    - The Court did not address appellant's argument or its reliance on *Clear Channel* in affirming the district court's decision, because § 1123 pre-confirmation sales require a look forward to one of the § 1129(b)(2)(A) provisions – in this case, subsection iii, which the court held plainly did not provide for credit bidding.
  - Dissent – Judge Ambro
    - Without mentioning *Clear Channel*, the dissent adopted the appellant's argument that
    - § 1129(b)(2)(A) should be considered in the context of the whole of the Bankruptcy Code and such a reading indicated that § 1123 sales could only be authorized with an eye toward § 1129(b)(2)(A)(ii), which allows for credit bidding, not subsection iii.

Beyond the 9th Circuit (cont.)

- *In re Premier Entertainment Biloxi LLC*, No. 08-60349 (5th Cir.)
  - Appeal from U.S. Dist. Ct. for S.D. Miss.'s determination that mootness precluded appellant's appeal of bankruptcy court's confirmation of Debtor's Chapter 11 plan
  - Appellants' Joint Reply Brief
    - In arguing that the relief they sought was limited and, therefore, not equitably moot, the appellants cited *Clear Channel* as an example of a case in which a court concluded an appeal was not equitably moot, despite the occurrence of a sale, because the stripped liens could be reinstated without complexity or effect upon third parties.
  - Opinion, 2009 WL 1616681 (5th Cir. 2009) (unpublished)
    - The court rejected the appellants' argument, noting that although their failure to obtain a stay was not dispositive, it remained a factor in the court's decision-making. 2009 WL 1616681 at *3.
    - The court concluded that any relief available would involve overturning the sale and affecting third parties' rights, despite the appellants' argument to the contrary. Id. at *4.
    - Without addressing *Clear Channel*, the court affirmed the district court's determination that the appellant's appeal was equitably moot.

Beyond the 9th Circuit (cont.)

- *Asset Based Resource Group v. Polaroid*, No. 09-2860 (8th Cir.)
  - Appeal from U.S. Dist. Ct. for D. Minn.'s order affirming the bankruptcy court's decision authorizing sale free and clear under § 363(f)
  - Appellant's Reply
    - In arguing that the Debtor failed to establish a bona fide dispute that would support a free and clear sale pursuant to § 363(f)(4), the appellant relied upon *Clear Channel* to argue that the court could reverse the bankruptcy court's decision to reinstate the lien without undoing the sale itself.
  - The case has been scheduled for oral argument on May 11, 2010.

Subsequent History: Trial Practice

Prevalence of *Clear Channel*

- As of April 26, 2010, there have been 141 submissions to either U.S. District or Bankruptcy Court that cite to *Clear Channel*
  - **Only 16 of those submissions examine or discuss the case, as opposed to mere citation to or mention of the case (according to Westlaw's KeyCite).**

Bankruptcy Court for Central District of California

- *In re Bacchus Development, Inc.,* Nos. 8:09-19457 RK, 8:09-19460 RK, 8:09-15462 RK
  - Debtor's Emergency Motion for Order Authorizing Sale – The Debtor asserted that
  - § 363(f)(5) applied and argued that *Clear Channel* had been criticized, was to be applied narrowly, and did not apply to the facts of the case because the sale price exceeded the underlying debt such that there would be proceeds to which the liens would attach (as opposed to the credit bid scenario in *Clear Channel*).
  - Order (Sept. 28, 2009) – Court **authorized sale** without substantial discussion, stating that the sale provisions adequately protected the lienholders and that the sales could be made free and clear of the liens under both California and federal law such that
  - § 363(f) applied.
  - In March 2010, the Debtor criticized *Clear Channel* in the same manner in a second motion for authorization to sell (in relation to another parcel of the Debtor's property)
- *In re Centerstaging Musical Productions, Inc.*, No. 208BK13019
  - Official Committee of Unsecured Creditors' Objection to Debtor's Motion for Order Authorizing Sale – Relied on *Clear Channel* to contend that § 363(f)(3) did not apply because sale price did not exceed value of claims on property, purchaser knew it would be subject to existing liens, and § 363(m) should not protect lien-stripping.
  - Order (Nov. 26, 2008) – **Authorized sale**, rejected all objections, applied §§ 363(f)(2) & (3), and concluded purchaser was a good faith purchaser for the purposes of § 363(m).

Bankruptcy Court for Central District of California (cont.)

- *In re Fleetwood Entertainment, Inc.*, No. 09-14254-MJ
  - Debtor's Reply to Responses & Objections to Motion to Sell – Argued that the creditor's reliance upon *Clear Channel* was "misplaced," because like in *Jolan*, the Debtor was not using § 1129(b)(2)(A)'s cramdown procedure to satisfy § 363(f)(5), and that *Clear Channel* improperly departed from jurisprudence holding that the cramdown procedure does satisfy § 363(f)(5).
  - According to the docket, the Debtor withdrew the motion for authorization to sell on July 15, 2009.
- *In re Meruelo Chinatown, LLC*, No. 1:09-bk-21622-KT
  - Debtor's Motion for Order Authorizing Sale – Asserted that § 1129(b)(2)(A)(ii) satisfied
  - § 363(f)(5), *Clear Channel* "rejected the clear weight of authority" and did not provide authority for its conclusion that the cramdown procedures did not satisfy § 363(f)(5), and additional proceedings existed to satisfy § 363(f)(5), like in *Jolan.*
  - According to the docket, the court held a hearing on the motion on Jan. 8, 2010, but the docket gave no indication of the motion's current status.

Bankruptcy Court for Central District of California (cont.)

- *In re Paradise Investments, Inc.,* No. 2:09-bk-11419-MT
  - Creditor's Opposition to Debtor's Motion for Order Authorizing Sale – Adopted *Clear Channel* approach to § 363(f)(3)'s value determination and criticized the Debtor's attempts to distinguish and attack the validity of *Clear Channel.*
  - Order (July 31, 2009) – **Authorized the sale** of the property under all subsections of
  - § 363(f) and rejected all objections.
- *In re Roosevelt Lofts, LLC*, No. 1:09-bk-14214-GM
  - Motion for Order Authorizing Sale – Asserted that sale complied with the three factors *Clear Channel* set out as required under § 363(f)(5) and proceedings existed that satisfy § 363(f)(5) that are similar to those held sufficient in *Jolan.*
  - Second Motion for Order Authorizing Sale – Repeated assertion of first motion.
  - According to the docket, as of March 23, 2010, the motion remained continued without an order.

Elsewhere in the 9th Circuit

– *In re AAA Bowls Unlimited*, Nos. 08-16095, 08-16096 (Bankr. W.D. Wash.)

- Creditor's Objection to Debtor's Motion for Authority to Sell – Argued that the Debtor's proposed sale was analogous to the sale in *Clear Channel* and that, contrary to the *Jolan* ruling, no legal or equitable proceeding existed under Washington law to satisfy
- § 363(f)(5) in order to allow a free and clear sale.
- The last docket entry indicating the status of the motion was on Sept. 18, 2009, when minutes of a hearing were entered to reflect that the court would await an order to convert the case to Chapter 7. No such order appears later on the docket.

– *In re Aerisa, Inc.*, No. 2:09-bk-18456-RJH (Bankr. D. Ariz.)

- Debtor's Motion for Order Approving Sale – Discussed how *Jolan* distinguished *Clear Channel* and asserted that proceedings similar to the ones that *Jolan* concluded satisfy § 363(f)(5) exist under Arizona law to support a free and clear sale.
- Order (Sept. 10, 2009) – **Authorized sale**, concluded §§ 363(f)(2), (4), & (5) applied to allow the sale free and clear of liens, and accepted Debtor's argument (although without substantial discussion) that Arizona law provides proceedings that satisfy
- § 363(f)(5)'s money satisfaction requirement.

Elsewhere in the 9th Circuit (cont.)

– *In re Little Boat North, Inc.*, No. 08-15826 (Bankr. W.D. Wash.)

- Debtor's Reply in Support of Motion for Order Authorizing Sale – Cited *Clear Channel* to oppose creditor's argument that its lien was not an "interest" for the purposes of
- § 363(f)(5) and to reject creditor's assertion that § 363(f)(5) requires payment in full, then demonstrated that proceedings existed to compel the creditor to take money satisfaction such that § 363(f)(5) applied, as required by *Clear Channel*.
- Supplement to Debtor's Reply in Support of Motion for Order Authorizing Sale – Reasserted that § 363(f)(5) does not require full payment through money satisfaction and repeated argument that § 363(f)(5) applied.
- Order (Oct. 24, 2008) – **Authorized sale** under § 363(f) without discussing which subsection(s) applied to permit the lien-stripping.

– *In re Vindom Properties, LLC*, No. 2:09-bk-03063-CGC (Bankr. D. Ariz.)

- Objection to Debtor's Motion to Sell – Cited *Clear Channel* to support assertion that
- § 363(f)(3) did not apply because the sale price did not exceed the aggregate value of the liens on the property and § 363(f)(5) did not apply because no proceeding existed to force the creditor to accept money satisfaction of its lien.
- Docket indicates a scheduling conference regarding the motion was to occur on Dec. 17, 2009, but does not reflect whether that hearing took place, what occurred if it did, or any other entries subsequent to that date regarding the motion.

Beyond the 9th Circuit

- *In re Gateway Ethanol, LLC*, No. 08-22579-DLS (Bankr. D. Kan.)
  - Objection to Sale re: Stripping Mechanics Lien – Stated that creditor was unaware of any proceeding in which it could be compelled to accept money satisfaction, so
  - § 363(f)(5) could not apply, and relied upon *Clear Channel* to argue that § 363(f) does not allow a secured creditor to credit bid and purchase free and clear of a junior lienholder.
  - Order (Jan. 5, 2009) – Overruled objections and **authorized sale** because "one or more of the standards set" by § 363(f) was satisfied.
- *In re Lyondell Chemical Co.*, No. 09-10023(REG) (Bankr. S.D.N.Y.)
  - Debtor's Motion for Order Approving Sale – Argued that the proposed sale of the Splitter assets could be sold free and clear under § 363(f) because the creditors consented and any other interest holders could be compelled in a legal or equitable proceeding to accept money satisfaction pursuant to § 363(f)(5), because like in *Jolan*, such proceedings existed under federal or Texas law.
  - Order (Oct. 7, 2009) – **Authorized the sale**, rejected all objections, and applied § 363(f) to strip the liens without indicating which subsection(s) applied.

Beyond the 9th Circuit (cont.)

- *In re Old Carco LLC*, No. 09-50002 (Bankr. S.D.N.Y.)
  - Corrected Objection to Debtor's Motion for Order Authorizing Sale – see discussion of In re Chrysler, *supra*.
- *In re General Motors Corp.*, No. 09-50026 (Bankr. S.D.N.Y.)
  - Limited Objection of Secured Lenders – Relied upon *Clear Channel* in arguing that
  - § 363(f)(5) could not apply to Debtors' sale because the § 1129(b)(2)(A) cramdown procedure is not an applicable legal or equitable proceeding and cited *Clear Channel* in asserting that "[m]ost courts" reject the Debtors' contention "that [§ 363(f)(5)] applies whenever a claim or interest can be paid with money, even if less than face value."
  - Order (July 5, 2009) and Opinion, 407 B.R. 463 – Court granted GM's motion for **authorization of § 363 sale** free and clear under subsection (f) because "one or more of the" subsection's provisions applied. The court did not expand on that portion of the order in its opinion, which only discussed subsection (f) in the context of whether certain creditors' claims constituted an "interest" that could be cleared, and did not address the Secured Lenders' objection that relied on *Clear Channel*.

Beyond the 9th Circuit (cont.)

- *In re US Datanet Corp.*, Nos. 08-32560, 08-32561, 08-32562 (Bankr. N.D.N.Y.)
  - Objection of Official Committee of Unsecured Creditors – Argued that the court could not authorize the Debtor's proposed free and clear sale under § 363(f)(3) because, in light of *Clear Channel*, "it is well-established that" a court may not approve a sale when the proposed sale price is insufficient "to satisfy the value of the liens of" secured creditors and no other subsection applies.
  - Order (Mar. 20, 2009) – **Authorized sale**, overruled objections, and concluded that at least one of the § 363(f) subsections applied, without specifying which, such that the sale could be free and clear of liens.

Conclusion: Muddled Waters

- *Clear Channel* continues to be cited in sale pleadings, particularly within the 9th Circuit.
- Notwithstanding that, sales continue to be approved free and clear of "out of the money" junior liens.
- Within the 9th Circuit itself, there is now contrary support authorizing sales of the type proposed in *Clear Channel* to proceed under § 363(f)(5), so long as the Debtor can point to a provision of federal or state law that satisfies the "proceedings" requirement (i.e. *Jolan*) aside from the cramdown provisions of § 1129.
- In instances where *Clear Channel* has been cited in other jurisdictions, the effect has been limited and sales have been authorized.
- **Key**: *Clear Channel* will continue to be cited as a means of gaining strategic leverage in a proposed sale, but so far in the almost two years since it was published, it has not radically changed the ability to do so free and clear.

"Free and Clear"--Barring Successor Liability

- Successor Liability – The Basics
  - Under **state law,** as a general rule, a purchaser of assets does not assume the liabilities of the seller unless the purchaser agrees to do so.
- There are, of course, exceptions:
  - If the sale is the equivalent of a consolidation or merger
  - If the purchase is a "mere continuation of the seller"
  - If the sale is a fraudulent device to escape seller's liabilities,

  Then the acquiror may be liable for claims against its seller.

- The first and second exceptions are often viewed as two sides of the same coin. To establish them, these factors are considered:
  - Continuity of ownership
  - Cessation of seller's business
  - Assumption by buyer of those seller liabilities necessary for continuation of purchased business
  - Continuity of management, personnel, facilities, general operations
- Some states have lowered the bar for successor liability vis a vis consumer products liability.

Sales in Bankruptcy

- As a matter of course, buyers in Section 363 sales require that the assets sold be "free of all claims, liens, encumbrances and any other interests."
  - One subset of this requirement is that the assets, and the buyer, be free of any successor or transferee liability.
- The statutory premise for this requirement is Section 363(f), which permits a sale "free and clear of any interest in such property [being sold] of an entity other than the estate," if one of five alternative conditions is met.

- Is a claim an "interest" under section 363(f)? The continuing search for an answer (or rationale)
  - The statutory language apparently does not answer the question.
    - Section 363(f)(B)
    - Section 1141(C)
  - The legislative history does not answer the question
  - Precedent provides a result, but an answer?

- Are there claims not encompassed by Section 363(f) and, thus, not potentially subject to a bar of successor liability?
  - Environmental claims, whether private or public, do not escape the bar
    - But consider buyer's going forward obligation to comply with applicable law
  - Claims with special treatment under the Code do not escape the bar, e.g.,
    - Retiree benefits under Section 1114
    - Asbestos claimants under Section 524(g)
  - Product liability claims do not escape the bar.

- But what if future claims, i.e., claims against the debtor that do not exist as of the date the sale is approved but may arise in the future, such as from the use or exposure to a product made and/or sold by the debtor before the sale?
  - What, if any, due process limitations are there to the barring of claims that don't exist when the bar is imposed?