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## SECTION 363 SALES: MOOTING DUE PROCESS?

### ABSTRACT

*The use of § 363 sales has become immensely popular. The mechanism is no longer used just to get cash funding through the reorganization, but to dispose of the bankruptcy petition altogether. The primary benefit of § 363 sales is their speed. The Lehman Brothers, Chrysler, and General Motors bankruptcies demonstrated exigent situations in which courts approved quick § 363 sales to avoid the risk of allowing such large companies to fail. The speed of § 363 sales provides an efficient mechanism to obtain cash without confirming a reorganization plan, but this speed also leaves creditors vulnerable to due process violations because of the condensed time frame.*

*Once a court authorizes a § 363 sale, respect for the finality of good faith purchases makes creditors' opportunity for appellate review very limited. Final sale orders are immune from modification or reversal by the mootness provision in § 363(m). The shroud of mootness can compel debtors to create an emergency situation, forcing courts to choose between approving abridged procedural protections and compromising a successful reorganization. This Comment will demonstrate how Chrysler and GM serve as examples for how debtors and powerful asset purchasers can use § 363 to expedite and moot creditor due process. This Comment suggests that protecting due process is an equally important pillar of bankruptcy law as finality and makes recommendations to mitigate creditors' lack of remedies in § 363 sales without sacrificing the principle of finality.*

## INTRODUCTION

Over the past two decades, § 363 sales have become an increasingly common and controversial method to reorganize financially distressed companies. Section 363 offers a distressed company an efficient mechanism to obtain cash for its reorganization. By condensing the bankruptcy process, § 363 sales make creditors' due process rights especially vulnerable. Nonetheless, once a court authorizes a sale, a creditor has very little opportunity to appeal.

Section 363 sales allow a trustee or debtor-in-possession ("DIP") to use, sell, or lease all or substantially all of the property of the estate, outside the ordinary course of business, provided there is notice and hearing of the sale.<sup>1</sup> Since the addition of § 363 to the Bankruptcy Code (the "Code"),<sup>2</sup> § 363 sales are increasingly used not only to obtain cash to fund the reorganization process, but to sell entire companies and dispose of the bankruptcy without a plan. The surge of § 363 sales corresponds with debtors increasingly using chapter 11 as a means to sell a business.<sup>3</sup> More than twenty percent of chapter 11 cases are disposed of through § 363 sales.<sup>4</sup>

Finality is a vital pillar of bankruptcy: it creates certainty that parties can continue in reorganization without being mired in endless litigation. In § 363 sales, finality encapsulates that reverence for bona fide purchasers.<sup>5</sup> Ensuring finality encourages participation in reorganizations and increases the amount bidders are willing to pay for debtors' assets.<sup>6</sup> Congress emphasized finality by incorporating § 363(m), which moots appeals of authorized § 363 sales.<sup>7</sup> Thus,

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<sup>1</sup> 11 U.S.C. § 363(b) (2006). While the statute refers to the "trustee," the debtor in possession may exercise all the rights afforded to the trustee. *Id.* §1107.

<sup>2</sup> See H.R. REP. NO. 95-595, at 181-82 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6301-03 (discussing the legislative intent of the section).

<sup>3</sup> Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 80-81 (2004) (stating three-quarters of bankruptcies are used to sell the company). As of 2002, of the ten largest bankruptcies, eight used the bankruptcy court to sell their assets to the highest bidder. *Id.*; see also Appendix A, Chart I.

<sup>4</sup> This is true for 2003-2009; 2010 data does not yet bear this out. *363 Sales of All or Substantially All Assets in Large, Public Company Bankruptcies, as a Percentage of All Cases Disposed, by Year of Case Disposition*, AM. BANKR. INST. (last visited on Oct. 5, 2012), [http://lopucki.law.ucla.edu/tables\\_and\\_graphs/363\\_sale\\_percentage\\_graph\\_4-6-2011.pdf](http://lopucki.law.ucla.edu/tables_and_graphs/363_sale_percentage_graph_4-6-2011.pdf).

<sup>5</sup> The terms "bona fide purchaser" and "good faith purchaser" are synonymous. A good faith purchaser's purchase for value has a superior right to purchased property to transferor's creditors, even if the transferor defrauds the creditor. BLACK'S LAW DICTIONARY 1355 (9th ed. 2009).

<sup>6</sup> *In re Sax*, 796 F.2d 994, 997 (7th Cir. 1986).

<sup>7</sup> 11 U.S.C. § 363(m) (2006); see also *infra* Part I.B.

if undiscovered oversights or mistakes occur prior to the sale's authorization, creditors have extremely limited options for appellate review.<sup>8</sup>

The right of aggrieved parties to have adverse decisions reviewed competes with a strong policy of finality.<sup>9</sup> Courts face the challenge of juggling competing claims to fashion the optimal relief to all creditors. Standards for sale approval give great weight to the debtor's and buyer's insistence that the sale be done urgently. Though this urgency may be authentic, it poses the danger of tipping the scales too heavily in favor of a debtor in a conflict with a creditor. Because creditors have limited recourse for grievances post-authorization, courts must strive to balance the scales prior to sale confirmation.

This Comment addresses the competing policies that materialize in § 363 proceedings: due process for all parties affected by a sale and protecting the viability of sales through finality. Part I discusses the efficiency of § 363 sales, while demonstrating the negative ramifications of the diminished protections for creditors. Part II examines the concerns that can arise with quick sales through discussion of the Chrysler and General Motors bankruptcies and their progeny. Because expedited proceedings are vulnerable to error, some courts have interpreted § 363(m) to allow relief when such relief would not sacrifice finality. Capitalizing on such a balance, Part III suggests an equitable approach to due process, which weighs the interests of a successful reorganization and of the creditors to ensure both parties are protected before a sale is authorized, to avoid undermining the finality of sales.

## I. SECTION 363 SALES

Section 363 sales offer great advantages but have less protection for creditors than the plan process. The procedure relies heavily on the debtor's judgment to assess the exigency of the situation, and puts creditors at a disadvantage because they must act quickly, despite an informational disadvantage, to successfully object to a motion for sale. Once a court authorizes the sale, creditors have very limited opportunity for redress because mootness operates to protect good faith buyers and foreclose appeals. Though

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<sup>8</sup> See *infra* Part I.B.

<sup>9</sup> Ira L. Herman, *Finality Through Mootness: Protecting Capital Providers in Bankruptcy Cases.*, ASSET SALES COMM. NEWSLETTER, Apr. 2007, at 7, available at [www.abiworld.org/committees/newsletters/assetsales/vol4num2/AssetSales.pdf](http://www.abiworld.org/committees/newsletters/assetsales/vol4num2/AssetSales.pdf) (citing *Mission Iowa Wind Co. v. Enron Corp.* (*In re Enron Corp.*), 291 B.R. 39 (S.D.N.Y. 2003)).

a party might seek a stay pending appeal, the court that approved an exigent sale is unlikely to grant the extraordinary remedy.

### A. Section 363 Sale Advantages & Disadvantages

#### 1. Advantages: Section 363 Provides an Efficient Transfer of Assets Mechanism

Section 363 sales provide debtors a valuable and flexible tool. The option provides debtors the ability to quickly dispose of a rapidly depreciating asset, liquidate the estate expediently, and complete the sale without a lengthy chapter 11 reorganization plan.<sup>10</sup> The sales promote more efficient markets than liquidation.<sup>11</sup> The sales provide benefits to debtors by allowing sales free and clear of liens under § 363(f),<sup>12</sup> allow protections from successor liability, and have lower administrative costs than chapter 11.<sup>13</sup> Section 363 may allow actions that would normally not get confirmation as a chapter 11 plan or get shareholders' approval outside of bankruptcy.<sup>14</sup> One of the most significant

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<sup>10</sup> 3 COLLIER ON BANKRUPTCY ¶ 363.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).

<sup>11</sup> See *In re Gulf Coast Oil Corp.*, 404 B.R. at 407, 424 (Bankr. S.D. Tex. 2009) ("The principal justification for § 363(b) sales is that aggressive marketing in an active market assures that the estate will receive maximum benefit."); Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002); Jason Berge, *An Efficiency Model of Section 363(b) Sales*, 92 VA. L. REV. 1639 (2006). *Contra* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 24 (2007) (providing empirical evidence that judicially-based valuations are more accurate (based on post-reorganization trading values) than valuations in bidding).

<sup>12</sup> 11 U.S.C. § 363(f). The section allows such sales provided one of the following: (1) applicable nonbankruptcy law permits; (2) the entity consents; (3) the price of the property to be sold is greater than the aggregate value of all the liens on the property; (4) a bona fide dispute; or (5) the entity could be compelled in a legal or equitable proceeding to accept money satisfaction. *Id.* This Comment focuses on § 363(b), and will not discuss the breadth of a purchaser's ability to acquire assets without any accompanying liabilities. See, e.g., *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25, 37–47 (B.A.P. 9th Cir. 2008) (discussing statutory interpretation of § 363(f); see also Lee R. Bogdanoff, *The Purchase and Sale of Assets in Reorganization Cases-of Interest and Principal, of Principles and Interests*, 47 BUS. LAW. 1367, 1399–1425 (1992).

<sup>13</sup> Joseph J. Wielebinski, et al., *Recurrent and Developing Issues Encountered in Sales Pursuant to Section 363 of the Bankruptcy Code*, ADVANCED BUSINESS BANKRUPTCY CONFERENCE, MAY 1–2, 2008, AUSTIN, TEXAS, CHAPTER 2, at 1, available at [www.munsch.com/files/1610223\\_1.pdf](http://www.munsch.com/files/1610223_1.pdf). The 2005 amendments added more procedural hurdles to chapter 11 plans, making § 363 sales more attractive. See Daniel P. Winikka, *The Declining Use of Chapter 11 as a Reorganization Tool*, in BANKRUPTCY AND RESTRUCTURING CHAPTER 11 STRATEGIES 2009: TOP LAWYERS ON TRENDS AND KEY STRATEGIES FOR THE UPCOMING YEAR, 1 (Aspatore Thought Leadership ed., 2009).

<sup>14</sup> *Miami Ctr. Ltd. P'ship. v. Bank of N.Y.*, 838 F. 2d 1547, 1553 (11th Cir. 1998). *But see* Craig A. Sloane, *The Sub Rosa Plan of Reorganization: Side-Stepping Creditor Protections in Chapter 11*, 16 BANKR. DEV. J. 37, 62 (1999) (arguing a debtor should not be able to consummate a transaction which would not be approved under the plan provisions of chapter 11).

advantages of the sales is § 363(m), which statutorily moots appeals of § 363 sales.<sup>15</sup>

A quick resolution in bankruptcy offers advantages not only to the debtor, but also to the creditors and the national economy. Free of inefficiently deployed assets, a debtor can devote its newly obtained cash and energies to its future operations.<sup>16</sup> The sales avoid the potentially less efficient results that would be achieved through the bargaining and litigation of plan confirmation.<sup>17</sup> The buyer, who values the debtor's assets, will deploy them at a lower cost and with greater economic output.<sup>18</sup> Creditors forego the administrative costs of confirming a plan and, assuming a market auction for the assets sold, a fair return on their claims.<sup>19</sup> The national economy benefits from the continued existence of the debtor as an employer and output producer, more efficient deployment of resources, and less burden on bankruptcy courts.<sup>20</sup>

The Lehman Brothers bankruptcy demonstrated the necessity for the flexible, quick solution of § 363 sales. In 2008, facing the height of a financial crisis, Lehman had no more cash: after borrowing heavily from risky short-term financing, there were no more lenders, Lehman could not find a buyer, and the U.S. government denied the company federal bailout funds.<sup>21</sup> Lehman had no choice but to file chapter 11.<sup>22</sup> Barclay's immediately stepped in as a willing buyer.<sup>23</sup> Lehman's Chief Operating Officer testified that if the sale were not approved immediately, the company would likely disappear as a

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<sup>15</sup> *Infra* Part II.B.

<sup>16</sup> Robert G. Hansen & Randall S. Thomas, *Auctions in Bankruptcy: Theoretical Analysis and Practical Guidance*, 18 INT'L REV. L. & ECON. 159, 164 (1998).

<sup>17</sup> Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775, 777–81 (1988); *see also* Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987 (2002) (arguing that creditors have more leverage in plan confirmation negotiations).

<sup>18</sup> Robert G. Hansen & Randall S. Thomas, *Auctions in Bankruptcy: Theoretical Analysis and Practical Guidance*, 18 INT'L REV. L. & ECON. 159, 164 (1998) (arguing that ownership shifts from the bankrupt, or inefficient, firms, to more efficient users of those goods).

<sup>19</sup> *See* Baird & Rasmussen, *supra* note 11, at 786–87 (discussing the efficiency of going-concern sales in auctions).

<sup>20</sup> Bebchuk, *supra* note 17, at 777–81.

<sup>21</sup> *Bay Harbour Mgmt., Ltd. Corp. v. Lehman Bros. Holdings Inc. (In re Lehman Bros. Holdings Inc.)*, 415 B.R. 77, 79 (S.D.N.Y. 2009).

<sup>22</sup> *Id.* at 80–81. The court's approval pivoted on avoiding potential losses in the hundreds of billions of dollars. Barclay's Mem. in Opposition to the Rule 60 Motions and in Supp. to Enforce the Sale Order and Secure Delivery of Undelivered Assets, *Bay Harbour Mgmt., Ltd. Corp. v. Lehman Bros. Holdings, Inc. (In re Lehman Bros. Holding, Inc.)*, 415 B.R. 77 (S.D.N.Y. 2009) (Nos. 08-13555 (JMP), 08-01420 (JMP)), 2010 WL 390937 (Bankr. S.D.N.Y. Jan. 29, 2010).

<sup>23</sup> *Lehman Bros.*, 415 B.R. at 80.

going concern.<sup>24</sup> Before approving the expedited procedure, the court addressed the due process issues, noting that heavy media coverage of Lehman's bankruptcy proceedings served as ample notice to creditors to act to protect their rights.<sup>25</sup> The case represented the archetypical "melting ice cube" situation for which § 363(b) was intended: when the value of the debtor's assets is certain to decrease in the future.<sup>26</sup> The size of the assets for sale was so large that there would unlikely be another interested buyer.<sup>27</sup> Without cash, the company could not continue operations; the only alternative to the sale was immediate liquidation, which would elicit fewer funds for the estate and decrease overall economic output.<sup>28</sup>

## 2. *Disadvantages: Section 363 Provide Creditors Less Protection than a Plan*

The economic benefits of debtors quickly reorganizing are counteracted by the potential harms of creditors unwilling to lend because of the threat that speedy bankruptcies will bypass their rights. Weary of a bankruptcy system that sacrifices creditors' rights at the first sign of the debtor's imminent failure, creditors will stop lending to companies that exhibit any risk of bankruptcy.<sup>29</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See Fred N. David, *Interpreting the Supreme Court's Treatment of the Chrysler Bankruptcy and Its Impact on Future Business Reorganizations*, 27 EMORY BANKR. DEV. J. 25, 36 (2010) (discussing Ind. State Police Pension Trust v. Chrysler LLC (*In re Chrysler LLC*), 576 F.3d 108, 111 (2d Cir. 2009), *aff'd*, 556 U.S. 960, 960 (2009), *vacated*, 130 S. Ct. 1015 (2009), *remanded*, 592 F.3d 370 (2d Cir. 2010)).

<sup>27</sup> *In re Lehman Bros. Holdings, Inc.*, 445 B.R. 143, 180 (Bankr. S.D.N.Y. 2011), *aff'd in part, rev'd in part, sub nom. Barclays Capital, Inc. v. Giddens (In re Lehman Bros., Inc.)*, Nos. 11 Civ. 6052(KBF), 11 Civ. 6053(KBF), 2012 WL 2918675, at \*23 (S.D.N.Y. July 16, 2012) (reversed as to the assets to which Barclay's was entitled).

<sup>28</sup> *Id. But see* Joseph N. Argentina Jr. & Andrew C. Kassner, *The Fog of War, Bankruptcy Sales: Urgent Circumstances Help Preserve Bankruptcy Sales Despite Deficiencies*, 243 THE LEGAL INTELLIGENCER 83 (Apr. 29, 2011) (expressing doubt that the sale would have been approved but for the poor economic conditions).

<sup>29</sup> Barry E. Adler, *A Reassessment of Bankruptcy Reorganization After Chrysler and General Motors*, 18 AM. BANKR. INST. L. REV. 305, 315–16 & n.13 (2010) (suggesting that accepting these cases as precedential could increase the cost of capital, but acknowledging that empirical evidence to support this theory does not exist); Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727, 771 (2010) ("These are neither small nor simply fairness-based considerations: capital markets depend on effective mechanisms that prevent financial majorities from ousting financial minorities from their ratable position in an enterprise. That's what's at stake."); see also Brief for Washington Legal Foundation et al. as Amici Curiae Supporting Petitioner, *Ind. State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015 (2009) (No. 09-285), 2009 WL 3263076, at \*7 ("Absent clearly defined limits on the use of Section 363 sales to strip creditors of their security interests, the credit markets will dry up amidst investor uncertainty.").

Criticisms of § 363 include the vast power afforded to large creditors and/or existing management,<sup>30</sup> the potential for “sweetheart deals,”<sup>31</sup> less required disclosure than reorganization plans,<sup>32</sup> and the circumvention of the creditor committees and their interests.<sup>33</sup> Although reorganizations often entail lengthy confirmation processes, the procedures to approve chapter 11 plans protect creditors’ rights and ensure the sanctity of bankruptcy proceedings.<sup>34</sup> Although a debtor may sell substantially all of its assets through a reorganization plan under § 1123(b)(4),<sup>35</sup> most practitioners prefer § 363 sales because of the reduced time and cost.<sup>36</sup> In a § 363 sale, a buyer holds more leverage than the debtor, since reorganization depends on consummation of the sale.<sup>37</sup>

Since urgent sales often necessitate abbreviated notice, creditors have less time to process less information. For a plan, disclosure statements lengthen the process of confirming a plan but give creditors thorough information,<sup>38</sup> pursuant to the Code’s mandate of “adequate information.”<sup>39</sup> Disclosures for a § 363 sale need only contain a description of the property<sup>40</sup> and nothing more, not even the reason for the urgent sale.<sup>41</sup>

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<sup>30</sup> LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG BANKRUPTCY CASES IS CORRUPTING THE BANKRUPTCY COURTS* 167–80 (2005).

<sup>31</sup> See Elizabeth B. Rose, Comment, *Chocolate, Flowers, and § 363(b): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 EMORY BANKR. DEV. J. 249, 275–83 (2006).

<sup>32</sup> See *id.* at 277–80.

<sup>33</sup> George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 106 (2004). *But see* Baird & Rasmussen, *supra* note 11 (arguing that reorganizations will be displaced by 363 sales because of their efficiency).

<sup>34</sup> *In re Bombay Co.*, No. 07-44084-RFN-11, 2007 WL 2826071, at \*3 (Bankr. N.D. Tex. Sept. 26, 2007) (noting its preference for chapter 11, but if it is not used, creditors should at least be afforded the luxury of sufficient time to assess fully the proposed transaction).

<sup>35</sup> 11 U.S.C. § 1123(b)(4) (2006). This provision allows liquidation through chapter 11. 7 COLLIER, *supra* note 10, ¶ 1123.02[4].

<sup>36</sup> Robert M. Fishman & Gordon E. Gouveia, *What’s Driving Section 363 Sales After Chrysler and General Motors*, 19 J. BANKR. L. & PRAC. 4 Art. 2 (2010), available at Westlaw, 19 J. Bankr. L. & Prac. 4 Art. 2.

<sup>37</sup> See Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 731 (2009); *cf.* Miller, *supra* note 17 (arguing that chapter 11 is no longer an even playing field between debtors and creditors).

<sup>38</sup> See Elizabeth B. Rose, *supra* note 31, at 282–83 (2006) (discussing the difference in disclosure requirements between 363 and chapter 11 reorganization plans).

<sup>39</sup> 11 U.S.C. § 1125; see also George W. Kuney, *Let’s Make It Official: Adding an Explicit Preplan Sale Process as an Alternative Exit from Bankruptcy*, 40 HOUS. L. REV. 1265, 1290–93 (2004). However, most courts have local rules on what should be included in the motions and notice. Douglas E. Deutsch & Adam G. Landis, *An Introduction to Local Bankruptcy Rules*, AM. BANKR. INST. J., June 2009, at 55, 72.

<sup>40</sup> FED. R. BANKR. P. 2002(c)(1).

<sup>41</sup> COLLIER, *supra* note 10, ¶ 363.02[1].



Section 363 sales should only provide for the transfer of assets and not dictate the terms of reorganization that would be determined by a reorganization plan.<sup>42</sup> Courts call a plan disguised as a sale a “sub rosa plan.”<sup>43</sup> Allowing a sale to stipulate the terms of reorganization would “short circuit the plan,” without giving creditors the same opportunity as in a plan to protect their rights.<sup>44</sup> For instance, all plan confirmations require that the plan treat creditors “fair[ly] and equitabl[y]” and not unfairly discriminate against them.<sup>45</sup> The plan confirmation process offers creditors more time to air grievances and negotiate with the DIP. The imbalance of power of a creditor acting as a purchaser compounds the sale’s resemblance to a plan because a buyer-creditor gets extensive leverage in setting the terms of the sale as well as stalking horse bidder protections.<sup>46</sup> Stalking horse bidders get benefits for attracting other bidders and setting a bid floor, but these benefits should not be so great as to deter prospective buyers.<sup>47</sup> Bidding procedures that provide the buyer (a creditor) significant benefits at the expense of other creditors would violate protections afforded in plan confirmation.<sup>48</sup>

### 3. Sales Procedures

Courts generally take a supervisory role in § 363 sale procedures—deferring to market principles and the debtor’s business judgment. Federal Rule of Bankruptcy Procedure (the “Rules” or “Rule”) 6004 dictates the procedure for § 363 sales.<sup>49</sup> Often, the sale authorization process has two stages: the court approves the sale and the bidding procedures, and once the

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<sup>42</sup> Pension Benefit Guar. Corp. v. Brainiff Airways, Inc. (*In re Brainiff Airways, Inc.*), 700 F.2d 935, 940 (5th Cir. 1983).

<sup>43</sup> *Id.*

<sup>44</sup> See *In re Gen. Motors Corp.*, 407 B.R. 463, 495 (citing *Brainiff Airways*, 700 F.2d at 940). But see Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375 (arguing *Chrysler* and *GM* effectively stripped the *sub rosa* doctrine of any meaning).

<sup>45</sup> 11 U.S.C. § 1129(b)(1) (2006).

<sup>46</sup> Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129, 154 (2005) (explaining that DIP financing is increasingly common because debtors have large amounts of secured debt). Because of this, pre-bankruptcy secured creditors have greater leverage to impose severe covenants and conditions on the debtors and its activities. *Id.*

<sup>47</sup> See Robert J. Keach, *Stalking-Horse Lenders and Good Faith: The Availability of Appellate Protection Under §§ 363(m) and 364(e) for Asset Purchasers Extending DIP Financing*, AM. BANKR. INST. J., June 2004, at 28, 58.

<sup>48</sup> See Roe & Skeel, *supra* note 29, at 755.

<sup>49</sup> 10 COLLIER, *supra* note 10, ¶ 6004.01.

auction is complete, the court approves the purchaser.<sup>50</sup> Sometimes, the court approves a single buyer and there is no auction.<sup>51</sup> When there is an auction, many judges believe they should have limited or no involvement because they believe an auction results in a more accurate valuation without a judge's intervention.<sup>52</sup> A debtor often negotiates bidding and sale procedures with a stalking horse bidder.<sup>53</sup> The initial stalking horse bid is always subject to better offers.<sup>54</sup> Courts defer to the business judgment of the debtor's management when approving bidding procedures and the *best offer*.<sup>55</sup> The *best offer* need not be the highest, but the DIP must have a compelling reason for why a lower offer is superior to the highest.<sup>56</sup> When there is only one bidder, judges have little option but to conclude that the proposed sale is the highest and best.<sup>57</sup>

When approving a lone bidder or the bidding procedures for an auction, the court must also approve the manner by which creditors will be notified of the sale.<sup>58</sup> Section 102(1)(A) provides that notice is required as "appropriate in the particular circumstances."<sup>59</sup> Rule 6004, which governs the § 363 sale procedure, incorporates the notice procedures of Rule 2002.<sup>60</sup> Rule 2002

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<sup>50</sup> Jonathan Friedland & James H.M. Sprayregen, *The Legal Considerations of Acquiring Distressed Businesses: A Primer*, 11 J. BANKR. L. & PRAC. 3 Art. 8 (2001), available at Westlaw 11 J. Bankr. L. & Prac. 3 Art. 8.

<sup>51</sup> *Id.* at 13.

<sup>52</sup> *Id.* at 9–10; see also H.R. REP. NO. 95–595, at 227 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6186–87 (explaining that judicial valuations are a disfavored process).

<sup>53</sup> A stalking horse bidder is the bidder who the debtor chooses to make the first bid. The most common protection is a break-up fee. Michael Sirota & Felice Yudkin, *Litigation Concerning the Use, Sale, or Lease of Estate Property Other than Cash Collateral*, in COMM. BANKR. LITIG. § 7:5 (Jonathan P. Friedland ed., 2011).

<sup>54</sup> Frank B. Reilly, Jr. & David N. Crapo, *Distressed M&A: Bankruptcy Code Section 363 Sales*, PRATT'S J. BANKR. L., Apr. 2009, available at Westlaw, JBKRL 2009.04-1.

<sup>55</sup> See H.R. REP. NO. 95–595, at 227, 1978 U.S.C.C.A.N. at 6186–87 (explaining that judicial valuations are a disfavored process); see also, e.g., *In re Borders Grp., Inc.*, 453 B.R. 477, 482–83 (Bankr. S.D.N.Y. 2011); *In re Bombay Co.*, No. 07-44084-RFN-11, 2007 WL 2826071, at \*4 (Bankr. N.D. Tex. Sept. 26, 2007); *In re 995 Fifth Ave. Assocs., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989).

<sup>56</sup> *Borders Grp.*, 453 B.R. at 482–83 (citing *In re Gulf States Steel, Inc.*, 285 B.R. 497, 516 (Bankr. N.D. Ala. 2002)) (holding that courts defer to a debtor's business judgment when selecting the highest and best bids); see also *In re Dewey Ranch Hockey, L.L.C.*, 406 B.R. 30, 40 (Bankr. D. Ariz. 2009) (holding the debtor could purchase one bidder over another because of its interest in maintaining the team's location).

<sup>57</sup> COMM. ON BANKR. AND CORPORATE REORGANIZATION, N.Y.C. BAR, CORPORATE BANKRUPTCIES: TRENDS IN ASSET SALES AND LIQUIDATIONS (2010), available at <http://www.nycbar.org/pdf/report/uploads/20071875-CorporateBankruptciesTrendsInAssetSalesandLiquidations.pdf>; see also *In re Virtuous Steel Prods. Co.*, 911 F.2d 1223, 1232–33 (7th Cir. 1990) (holding the bankruptcy court's balancing between the need to wait for the "best offer" and need to stop future losses was not unreasonable).

<sup>58</sup> COLLIER, *supra* note 10, ¶ 363.02[1].

<sup>59</sup> 11 U.S.C. § 102(1)(A) (2006).

<sup>60</sup> 10 COLLIER, *supra* note 10, ¶ 6004.01.

requires twenty-one days' notice, unless shortened for cause shown.<sup>61</sup> No court can grant any relief within twenty-one days of the filing of a petition, unless necessary "to avoid immediate and irreparable harm."<sup>62</sup>

Section 102 authorizes action without a hearing if no party-in-interest timely requests one.<sup>63</sup> Courts usually infer from a lack of objections that a sale may proceed without a hearing.<sup>64</sup> The short time between a proposed sale and authorization can leave a creditor little time to formulate a meaningful objection to counter the debtor's extensively prepared argument for the sale's dire need.<sup>65</sup> Disorganized creditors' committees or smaller creditors with less sophisticated counsel suffer from disadvantages in formulating objections: they have less information, less time, and possibly a geographic barrier.<sup>66</sup> A party may object to a sale order, but must do so at least seven days before the court hears a motion for sale.<sup>67</sup> Objections might allege that the purchase price is suboptimal, that the purchase price does not provide adequate protection under § 363(e),<sup>68</sup> collusion under § 363(n),<sup>69</sup> or that the sale constitutes a sub rosa plan.<sup>70</sup>

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<sup>61</sup> FED. R. BANKR. P. 2002(a)(2). Judges have discretion to shorten notice requirements per Rule 9006(c)(1). *Id.* 9006(c)(1). *See infra* Part II.D.4.a.

<sup>62</sup> FED. R. BANKR. P. 6003. Subsection (b) enumerates § 363 sales as being governed by the rule. *Id.* 6003(b).

<sup>63</sup> 11 U.S.C. § 102; *see also* COLLIER, *supra* note 10, ¶ 363.02 (citing *In re Robert L. Hallamore Corp.*, 40 B.R. 181, 182–83 (Bankr. D. Mass. 1984) (explaining that the 1978 Amendments allowed sales without court approval under Rule 2002 and 6004)).

<sup>64</sup> COLLIER, *supra* note 10, ¶ 363.02 [1][a]. *But see In re Bombay Co.*, No. 07-44084-RFN-11, 2007 WL 2826071, at \*4 (Bankr. N.D. Tex. Sept. 26, 2007) (noting that even though there were some objectors, the court was not satisfied that all potential objectors had the opportunity to voice their objections); *In re Naron & Wagner, Chartered*, 88 B.R. 85, 89 (Bankr. D. Md. 1988) (holding a second round of notice statements as adequately notifying creditors in lieu of chapter 11 organization disclosure).

<sup>65</sup> *See* Christopher W. Frost, *Running the Asylum: Governance Problems in Bankruptcy Reorganizations*, 34 ARIZ. L. REV. 89, 128–29 (1992) (explaining that judges only get a one-sided version of the facts when parties do not have an opportunity for fact finding); *see also infra* Part II.C (discussing that in *GM* the court worked through 850 objections in just three days); *cf.* Rose, *supra* note 31, at 262.

<sup>66</sup> Because of the Code's venue provisions, debtors have wide latitude on where to file. *See* 28 U.S.C. § 1408. For discussion on the topic of forum shopping generally, *see* generally Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999); William C. Whitford, *Venue Choice: Where the Action Is*, 54 BUFF. L. REV. 321 (2006); Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141 (2006).

<sup>67</sup> The court may also fix a different time for objections. FED. R. BANKR. P. 6004(b). While a hearing date is not necessary if there are no objections, the notice should set a court date. 10 COLLIER, *supra* note 10, ¶ 6004.01.

<sup>68</sup> 11 U.S.C. § 363(e). If an objection alleges inadequate protection, the burden of proof rests on the trustee. *Id.* § 363(p). To determine whether a price is inadequate, a creditor may need to spend a significant amount of money for an independent valuation. A fair market sales procedure is usually enough proof of

If there are no objections, the sale may also proceed without court authorization, but buyers usually request a court order for the sale with an explicit finding of good faith.<sup>71</sup> The term “good faith” has no definition in the Code.<sup>72</sup> Most courts require a finding that the party who acquired the property was (a) in good faith, as per the traditional definition of not in bad faith, (b) for value, and (c) without knowledge of adverse claims.<sup>73</sup> Section 363(m) explicitly protects good faith buyers; thus, many sale orders state that the purchaser meets the good faith standard of § 363(m).<sup>74</sup>

Once a court authorizes a sale, Rule 6004(h) provides an automatic fourteen-day stay before sale consummation, but the Rule grants the judge discretion to shorten or eliminate the stay.<sup>75</sup> In theory, the Rule aimed to avoid the race to court between a creditor (seeking to stop the sale) and a seller (seeking quick approval and mootness protection).<sup>76</sup> In practice, courts almost always eliminate the stay in light of the debtor’s push to complete the sale quickly.<sup>77</sup> As discussed below, a stay pending appeal is an extraordinary remedy, and parties are unlikely to succeed on a motion for one.<sup>78</sup>

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adequate protection. LoPucki & Doherty, *supra* note 11, at 38. The movant also bears the burden to prove “the issue of the validity, priority, or extent of such interest.” 11 U.S.C. § 363(p)(2).

<sup>69</sup> *Id.* § 363(n).

<sup>70</sup> See *supra* text accompanying notes 42–45.

<sup>71</sup> COLLIER, *supra* note 10, ¶ 363.02.

<sup>72</sup> See *Made in Detroit, Inc. v. Official Comm. of Unsecured Creditors of Made in Detroit, Inc.* (*In re Made in Detroit, Inc.*), 414 F.3d 576, 581 (6th Cir. 2005) (explaining that the traditional definition is circular because it provides that a good faith purchaser is one who purchases assets for value in good faith). Typical actions that denote bad faith are fraud, collusion, or an attempt to take grossly unfair advantage of other creditors. See *id.*

<sup>73</sup> See, e.g., *T.C. Investors v. Joseph* (*In re M Capital Corp.*), 290 B.R. 743, 746 (B.A.P. 9th Cir. 2003); *Willemain v. Kivitz*, 764 F.2d 1019, 1023 (4th Cir. 1985) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1197 (7th Cir. 1978)).

<sup>74</sup> E.g., General Order M-383, U.S. BANKR. COURT S. DIST. N.Y., <http://www.nysb.uscourts.gov/orders/m383.pdf> (last visited Nov. 4, 2012); Guidelines Re Sale Orders, U.S. BANKR. COURT N. DIST. CAL., <http://www.canb.uscourts.gov/procedures/dist/guidelines/order-re-sale-orders> (last visited Nov. 4, 2012); Bob Eisenbach, *Delaware Bankruptcy Court Adopts New Local Rule for Section 363 Sales*, IN THE (RED): THE BUSINESS BANKRUPTCY BLOG, <http://bankruptcy.cooley.com/2008/02/articles/business-bankruptcy-issues/delaware-bankruptcy-court-adopts-new-local-rule-for-section-363-sales/> (last visited Nov. 4, 2012).

<sup>75</sup> FED. R. BANKR. P. 6004(h).

<sup>76</sup> COLLIER, *supra* note 10, ¶ 363.11.

<sup>77</sup> Josef S. Athanas, *Section 363 Bankruptcy Sales Attacked by Judges and Commentators Just as Economic Conditions Make Them More Important Than Ever*, in BANKRUPTCY AND RESTRUCTURING CHAPTER 11 STRATEGIES 2009: TOP LAWYERS ON TRENDS AND KEY STRATEGIES FOR THE UPCOMING YEAR, 1 (Aspatore Thought Leadership ed., 2009)..

<sup>78</sup> *Infra* Part I.C.

## B. Mootness

Section 363(m) sets a seemingly clear standard that no asset can be taken back from a good faith purchaser, regardless of other equitable concerns. The statute reads:

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.<sup>79</sup>

The provision furthers the goal of finality by protecting good faith buyers.<sup>80</sup> The reverence for finality predates the Code.<sup>81</sup> All courts agree on the importance of this interest, but disagree on whether there are exceptions to this statutory mootness provision.<sup>82</sup>

The plain meaning of § 363(m) protects *only* good faith buyers from appeals challenging the validity of the buyer's title. Though the statute allows an appeal if a stay was obtained, courts disagree on whether this provision bars *all* appeals absent a stay or allows exceptions when an appeal would not modify "the validity of the sale."<sup>83</sup> Some courts broadly interpret that reopening *any* part of the sale order on which the buyer relied would disturb the validity of the sale.<sup>84</sup> However, some courts specify that relief from parties other than the good faith buyer is possible if the validity of the sale would not

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<sup>79</sup> 11 U.S.C. § 363(m) (2006).

<sup>80</sup> *Vlasek v. Levey (In re Vlasek)*, 325 F.3d 955, 961 (7th Cir. 2003); *Cinicola v. Scharffenberger*, 248 F.3d 110, 1121–22 (3d Cir. 2001); *Boullioun Aircraft Holding Co. v. Smith Mgmt. (In re W. Pac. Airlines, Inc.)*, 181 F.3d 1191, 1195 (10th Cir. 1999); *In re Lehman Bros. Holdings, Inc.*, 445 B.R. 143, 181 (Bankr. S.D.N.Y. 2011) (citing *United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991)), *aff'd in part, rev'd in part, sub nom. Barclays Capital Inc. v. Giddens (In re Lehman Bros., Inc.)*, 473 B.R. 34 (S.D.N.Y. 2012); *GAF Holdings, L.L.C. v. Rinaldi (In re Farmland Indus., Inc.)*, 408 B.R. 497, 508 (B.A.P. 8th Cir. 2009) (citing Official Comm. of Unsecured Creditors v. Trism, Inc. (*In re Trism, Inc.*), 328 F.3d 1003, 1006 (8th Cir. 2003)), *aff'd*, 639 F.3d 402 (8th Cir. 2011).

<sup>81</sup> H.R. REP. DOC. NO. 93-137, pt.1, 100 n.26 (1973) (quoting *Ex parte Christy*, 44 U.S. (3 How.) 292, 312 (1845)).

<sup>82</sup> See *infra* Part II.C.

<sup>83</sup> Compare *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998), with *Cincinnati Microwave, Inc. v. Baldiga (In re Whistler Corp. of Mass.)*, 243 B.R. 573, 575 (D. Mass. 2000) (rejecting a validity of the sale exception).

<sup>84</sup> But see *In re Cont'l Airlines*, 91 F.3d 553, 572 (3d Cir. 1996) (Alito, J., dissenting) ("The mere act of entertaining that claim would not imperil Continental's reorganization or impair any legitimate reliance interests.").

be disturbed.<sup>85</sup> One bankruptcy appellate panel held that § 363(m) only protects sales under subsections (b) and (c).<sup>86</sup> Most courts reject this interpretation because sales under subsections (b) and (c) rely on the other subsections of § 363.<sup>87</sup>

Once an appeal is declared moot, the court will never consider the merits of an appellant's motion. Statutory mootness precludes appeals regardless of whether there is still a live controversy.<sup>88</sup> In any bankruptcy case, relief on appeal is especially tricky because of the limited ability for relief.<sup>89</sup> When there is no equitable relief possible in a bankruptcy matter, courts may declare the issue equitably moot.<sup>90</sup> Most courts adopt a multi-part test to determine whether equitable mootness applies,<sup>91</sup> with substantial consummation<sup>92</sup> as the foremost factor.<sup>93</sup> In § 363 sales, consummation is more direct than in a plan: once a court authorizes a sale, the only remedy is to take back the assets from

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<sup>85</sup> *Salerno*, 932 F.2d at 123 (holding that while an appeal concerning a sale order was moot, appellant was free to object to the distribution of the proceeds).

<sup>86</sup> *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, L.L.C.)*, 391 B.R. 25, 35–36 (B.A.P. 9th Cir. 2008); *see infra* Part I.I.C.3.

<sup>87</sup> Official Comms. of Unsecured Creditors v. Anderson Senior Living Prop., L.L.C. (*In re Nashville Senior Living, L.L.C.*), 407 B.R. 222, 228 (B.A.P. 6th Cir. 2009) (“Clear Channel appears to be an aberration in well-settled bankruptcy jurisprudence applying § 363(m) to the ‘free and clear’ aspect of a sale under § 363(f).”).

<sup>88</sup> Constitutional mootness requires that an actual controversy exist at all times throughout litigation. *Mills v. Green*, 159 U.S. 651, 653 (1895); *see also* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 160 (3d ed. 2006). Equitable mootness, like statutory mootness, may moot still live controversies. *See Cont'l Airlines*, 91 F.3d at 569 (calling the doctrine of equitable mootness a misnomer because it considers equities rather than the controversies).

<sup>89</sup> *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994).

<sup>90</sup> *See Nordhoff Inv., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 185 (3d Cir. 2001); *see generally* Matthew D. Pechous, Comment, *Walking the Tight Rope and Not the Plank: A Proposed Standard for Second-Level Appellate Review of Equitable Mootness Determinations*, 28 EMORY BANKR. DEV. J. 547 (2012) (outlining the standards of review used by courts on appeal—de novo or abuse of discretion).

<sup>91</sup> These factors are: (1) Whether a stay has been sought or obtained; (2) whether the plan has been substantially consummated; (3) whether the relief requested would affect the rights of third parties; (4) whether the relief requested would affect the success of the confirmed plan; and (5) the public policy of affording finality to bankruptcy judgments. *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1338 (10th Cir. 2009) (internal citation omitted). For a discussion for the various approaches and variations of this test, *see* Caroline L. Rosiek, Note, *Making Equitable Mootness Equal: The Need for a Uniform Approach to Appeals in the Context of Bankruptcy Reorganization Plans*, 57 SYRACUSE L. REV. 685, 697–704 (2007).

<sup>92</sup> The Code elsewhere defines substantial consummation as the “(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.” 11 U.S.C. § 1101(2) (2006).

<sup>93</sup> *Nordhoff*, 258 F.3d at 185 (quoting *In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000)).

the buyer.<sup>94</sup> Although obtaining a stay pending appeal prevents the sale from consummating and preserves the right to appeal, doing so can prove challenging in the backdrop of a debtor urging a quick sale.

### C. Stay Pending Appeal

The right to appeal is not an absolute right—it is subject to a concern for finality.<sup>95</sup> The court of appeals, bankruptcy appellate panel (if existent), district court, or bankruptcy court may hear appeals from final bankruptcy judgments.<sup>96</sup> A party may motion directly to a higher court to hear an appeal only if such motion shows why relief was not obtained from the bankruptcy court.<sup>97</sup> A party has fourteen days from the entry of judgment to file a notice of appeal.<sup>98</sup> While other federal appeals allow thirty days,<sup>99</sup> bankruptcy appeals are allowed less time to prevent delays in the administration of the case.<sup>100</sup> Filing an appeal does not itself halt any order of the court; a stay pending appeal is necessary.<sup>101</sup>

Convincing the court to delay an authorized transaction with a stay pending appeal requires the movant to meet a heavy burden.<sup>102</sup> A stay pending appeal is similar to a preliminary injunction;<sup>103</sup> it is an extraordinary remedy at the court's discretion.<sup>104</sup> Rule 8005 governs the procedure for obtaining a stay pending appeal.<sup>105</sup> A movant must be able to provide a supersedeas bond.<sup>106</sup>

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<sup>94</sup> *Frito-Lay Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952–53 (2d Cir. 1993); see also *UNR Indus.*, 20 F.3d at 769 (discussing the inability to “unscramble an egg”).

<sup>95</sup> John P. Hennigan, *Toward Regularizing Appealability in Bankruptcy*, 12 EMORY BANKR. DEV. J. 583, 584, 588–89 (1996).

<sup>96</sup> 28 U.S.C. § 158(d)(2)(A). In 2005, Congress added this option to allow a party to appeal directly to the court of appeals. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. no. 109-8, § 1233, 119 Stat. 23, 202–04 (2005).

<sup>97</sup> FED. R. BANKR. P. 8005.

<sup>98</sup> *Id.* 8002(a).

<sup>99</sup> FED. R. APP. P. 4(a)(1)(A).

<sup>100</sup> FED. R. BANKR. P. 8002, advisory committee note.

<sup>101</sup> 28 U.S.C. § 158(d)(2)(D). The requirement for a stay pending appeal furthers the interest of finality by preventing an authorized action from consummating when there is still a chance the authorized action will be modified. *Vlasek v. Levey (In re Vlasek)*, 325 F.3d 955, 961–62 (7th Cir. 2003).

<sup>102</sup> *In re Gen. Motors Corp.*, 409 B.R. 24, 30 (Bankr. S.D.N.Y. 2009) (citations omitted).

<sup>103</sup> 6 COLLIER ON BANKRUPTCY PRACTICE GUIDE ¶ 117.11 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012) (citing *Rockwell Int'l Corp. v. White Motor Corp. (In re White Motor Corp.)*, 25 B.R. 293, 297 (N.D. Ohio 1982)).

<sup>104</sup> Edith H. Jones, *Bankruptcy Appeals*, 16 T. MARSHALL L. REV. 245, 269, 272 (1991) (citing *Hartigan v. Pine Lake Vill. Apartment Co. (In re Pine Lake Vill. Apartment Co.)*, 21 B.R. 395, 398 (S.D.N.Y. 1982)).

<sup>105</sup> FED. R. BANKR. P. 8005. A motion for a stay pending appeal must be presented to a bankruptcy judge in the first instance. *Id.*

The bond makes it difficult to secure a stay, particularly for larger transactions.<sup>107</sup> However, if the appealing party does not prevail, payment of the bond indemnifies the party whose action the stay pending appeal halts.<sup>108</sup>

Rule 8005 does not provide guidance on the criteria for consideration of a stay pending appeal, nor does the Rule require the court to specify its reasoning in a denial of a stay.<sup>109</sup> Many courts have adopted a four-factor test when considering a motion for a stay pending appeal:<sup>110</sup>

- (1) Whether the appellant made a substantial showing of likelihood to succeed on the merits on appeal;
- (2) whether the appellant will suffer irreparable injury absent the stay;
- (3) whether a stay would substantially harm the other parties in the litigation; and
- (4) whether a stay is in the public interest.<sup>111</sup>

There is significant variance among the courts as to how to weigh these factors.<sup>112</sup> The majority of courts hold that the movant bears the burden of persuading the court on all the factors.<sup>113</sup> Conversely, the minority says that none of these factors are dispositive but are weighed against one and other.<sup>114</sup>

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<sup>106</sup> A party who cannot provide this bond has the additional requirement of showing why the bond should deviate from the full amount. Richard S. Kanowitz & Michael A. Klein, *The Divergent Interpretations of the Standard Governing Motions for Stay Pending Appeal of Bankruptcy Court Orders*, 17 J. BANKR. L. & PRAC. Art. 3 (2008), available at Westlaw, 17 J. Bankr. L. & Prac. 4.

<sup>107</sup> George W. Kuney, *Slipping into Mootness*, in NORTON ANNUAL SURVEY OF BANKRUPTCY LAWS, 2007 EDITION (2007). FED R. BANKR. P. 7062 incorporates FED. R. CIV. P. 62(d), which does not specify how to calculate a bond amount, but courts have read in the requirements of the rule's predecessor, to require some proportion of the judgment remaining unsatisfied. Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979).

<sup>108</sup> ACC Bondholder Grp. v. Adelpia Commc'ns Corp. (*In re Adelpia Commc'ns Corp.*), 361 B.R. 337, 368 n.167 (S.D.N.Y. 2007).

<sup>109</sup> Since a movant appealing the denial of a stay to a higher court must provide it, an applicant is implicitly entitled to the court's reasoning if it rejects a stay. 10 COLLIER, *supra* note 10, ¶ 8005.11.

<sup>110</sup> *E.g.*, *In re Roth American, Inc.*, 90 B.R. 94, 95 (Bankr. M.D. Pa. 1988) (citing *In re Fosko Markets, Inc.*, 74 B.R. 384 (Bankr. S.D.N.Y. 1987)); *In re Crescenzi*, 58 B.R. 141, 143 (Bankr. S.D.N.Y. 1986); *In re Beker Indus. Corp.*, 57 B.R. 611, 632, 633 (Bankr. S.D.N.Y. 1986).

<sup>111</sup> 10 COLLIER, *supra* note 10, ¶ 8005.08.

<sup>112</sup> Kanowitz & Klein, *supra* note 106.

<sup>113</sup> *E.g.*, *Hertz Corp. v. ANC Rental Corp.* (*In re ANC Rental Corp.*), No. 01-11220, 2002 WL 1058196, at \*2 (D. Del. May 22, 2002) (citing *In re Blackwell*, 162 B.R. 117, 120 (E.D. Pa. 1993)); *Ohanian v. Irwin* (*In re Irwin*), 338 B.R. 839, 843 (E.D. Cal. 2006); *In re Tower Automotive, Inc.*, No. 05-10578, 2006 WL 2583624, at \*1 (Bankr. S.D.N.Y. 2006).

<sup>114</sup> *Adelpia*, 361 B.R. at 347 (citing *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002)); *see also* *Commonwealth Nat'l Bank v. Dobsław* (*In re Dobsław*), 20 B.R. 922, 924 (Bankr. E.D. Pa. 1982) (citing



When considering these factors, bankruptcy courts face the difficult task of weighing management's assertions of a sale's necessity against the fairness to the creditor of barring an appeal.<sup>115</sup> The first factor, likelihood to succeed on the merits, is problematic. If a judge has used her discretion to authorize an expedited § 363 sale, she believed it was necessary for the reorganization and is unlikely to find that an appeal to the contrary would succeed.<sup>116</sup> For the second factor, irreparable injury, courts are split on whether the risk of mootness itself constitutes irreparable injury.<sup>117</sup> Most courts hold that mootness does not constitute irreparable harm, since this threat exists in any bankruptcy proceeding.<sup>118</sup> In *In re Adelpia*, the Court for the Southern District of New York adopted the minority view.<sup>119</sup> The court reasoned that absent a stay, the strong possibility of mooting an appeal of significant claims of error constitutes irreparable harm.<sup>120</sup> Denying a stay pending appeal ensures meritorious claims "will never be heard on appeal due to mootness—a quintessential form of prejudice—which will inevitably result from the substantial consummation."<sup>121</sup> The *Adelpia* court found such prejudice greatly

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Constructors Assoc. v. Kreps, 573 F.2d 811, 815 (3d. Cir. 1978)) *aff'd sub nom. In re Ashe*, 712 F.2d 864 (3d Cir. 1983).

<sup>115</sup> Russell A. Eisenberg & Frances Gecker, *Due Process and Bankruptcy: A Contradiction in Terms?*, 10 BANKR. DEV. J. 47, 62 (1993).

<sup>116</sup> *E.g.*, *In re Gen. Credit Corp.*, 283 B.R. 658, 659–60 (S.D.N.Y. 2002); *N. Am. Enters. v. Fincke (In re Access Cardiosystems)*, 340 B.R. 656, 660 (Bankr. D. Mass. 2006); *In re Deep*, 288 B.R. 27, 30 (Bankr. N.D.N.Y. 2003); *Miraj & Sons, Inc.*, 201 B.R. 23, 26–27 (Bankr. D. Mass. 1996); *In re Public. Serv. Co. of N.H.*, 116 B.R. 347, 348–49 (Bankr. D.N.H. 1990); *see also* Kenneth S. Leonetti and & Euripides Dalmanieras, *Procedural Issues in Bankruptcy Appeals*, 17 A.B.I. NORTHEAST BANKRUPTCY CONFERENCE AND NORTHEAST CONSUMER FORUM 195, 247, available at Westlaw, 070810 ABI-CLE 195 (citing *Albiococco v. Albiococco (In re Albiococco)*, No. 06-3409, 2006 WL 2620464, at \*1 (E.D.N.Y. Sept. 13, 2006)).

<sup>117</sup> *Country Squire Assocs., L.P. v. Rochester Cmty. Sav. Bank (In re Country Squire Assocs., L.P.)*, 203 B.R. 182, 183 n.1 (B.A.P. 2d Cir. 1996); *Adelpia*, 361 B.R. at 347–48 (citing cases in the Second Circuit supporting the affirmative position in *Daly v. St. Germain (In re Norwich Historic Pres. Trust, L.L.C.)*, No. 3:05CV12(MRK), 2005 WL 977067 (D. Conn. Apr. 21, 2005)); *In re St. Johnsbury Trucking Co.*, 185 B.R. 687, 690 (S.D.N.Y. 1995); *see also In re Herrera*, 2010 WL 148182 (Bankr. W.D. Tex. Jan. 8, 2010); *In re Gen. Motors Corp.*, 409 B.R. 24, 31 (Bankr. S.D.N.Y. 2009) (accepting the threat of equitable mootness is enough to get on the "scoreboard"); *Williams v. George Junior Republic (In re Cujas)*, 376 B.R. 480 (Bankr. E.D. Pa. 2007).

<sup>118</sup> *See In re Baker*, No. CV05-3487, 2005 WL 2105802, at \*9 (E.D.N.Y. Aug. 31, 2005) ("As other courts have noted, the possibility that an appeal will be rendered moot by a denial of stay does not, in and of itself, constitute irreparable harm."); *see also Sunflower Racing, Inc. v. Mid-Continent Racing & Gaming (In re Sunflower Racing, Inc.)*, 223 B.R. 222, 225 (D. Kan.1998) (collecting cases).

<sup>119</sup> *Adelpia*, 361 B.R. at 347–48.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 368.

outweighed any financial harm from granting a stay pending appeal, particularly since posting bond would ameliorate such financial harm.<sup>122</sup>

Courts often do not get to the consideration of the third and fourth factors because the assessments of likelihood of success or irreparable harm are compelling enough.<sup>123</sup> Nonetheless, the third and fourth factors meld together and skew against the movant. The approval of an urgent sale indicates that delaying the sale would harm a debtor, particularly if an expectant buyer may walk away when faced with a delay.<sup>124</sup> The public interest lies with facilitating an economically beneficial speedy reorganization that benefits the public,<sup>125</sup> but courts rarely mention the public interest of protecting creditors.<sup>126</sup>

If a party fails to obtain a stay pending appeal for a sale order, § 363(m) will quickly moot any chance for a remedy for an aggrieved creditor. In considering a motion for stay pending appeal, the debtor's interests in reorganization outweigh the creditor's grievances, yet the creditors have no chance for further remediation once the motion is denied.

## II. HOW THE DEBTOR'S EXIGENCY OUTWEIGHS THE CREDITORS' DUE PROCESS RIGHTS

*In re Chrysler LLC* and *In re General Motors Corp.* were cases in which the need for speed proved weightier than concerns about the sale process and creditor rights. Perhaps those situations merited the emergency treatment, but the creditors could not appeal to a higher court their concerns that the sale circumvented priorities, garnered them a sub-optimal return, or constituted a sub rosa plan. A powerful party, the U.S. government, propelled the speedy sale confirmations. Embracing a deferential standard that placed the debtors' need for reorganization before meaningful due process, the courts paved the

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<sup>122</sup> *Id.*

<sup>123</sup> *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1067 (5th Cir. 1986) (finding there was not a likelihood of success on the merits); *Rally Auto Grp., Inc. v. Gen. Motors LLC (In re Motors Liquidation Co.)*, No. M-47(RPP), 2010 WL 4449425, at \*3-4 (S.D.N.Y. Oct. 29, 2010) (rejecting that the appellant would suffer irreparable harm, so a stay is not in the public interest); *In re McKenzie*, No. A09-78963-PWB, 2009 WL 6499259, at \*2 (Bankr. N.D. Ga. Oct. 30, 2009) (finding that there was not substantial likelihood of success on appeal); *FFG-NJ Vehicle Funding Corp. v. Holtmeyer (In re Holtmeyer)*, 229 B.R. 579, 582-83 (E.D.N.Y. 1999) (finding the appeal was doomed to failure, and even if it was not, there would be no irreparable harm).

<sup>124</sup> See *infra* Part II.A.2 (discussing the *Chrysler* and *GM* courts reliance on the buyer demands).

<sup>125</sup> See *e.g.*, *In re Savage & Assoc., P.C.*, No. 05 CIV.2072 (SAS), 2005 WL 488643, at \*2 (S.D.N.Y. Feb. 28, 2005) (“[P]ublic interest favors the expedient administration of the bankruptcy proceedings . . . .”); *Va. Dep’t of Med. Assistance Servs. v. Shenandoah Realty Partners*, 248 B.R. 505, 515 (W.D. Va. 2000).

<sup>126</sup> See Part I.A.2.

road for impatient buyers to hold courts hostage to threats of compromising the reorganization. Recognizing the potential unfairness to creditors, some courts have injected a more equitable approach to § 363(m) by allowing appeals when the court can fashion relief without compromising the principles of finality.

#### A. *Chrysler & GM*

The prominence and controversy surrounding the General Motors and Chrysler bankruptcies garnered attention to the problems of expedited § 363 sales.<sup>127</sup> Some criticisms focused on the judges favoring the goal of saving the companies rather than the Code's statutory goal of paying back the creditors.<sup>128</sup> Though the U.S. government's involvement in these cases seems exceptional,<sup>129</sup> the cases established influential precedent on what constitutes the melting ice cube scenario that necessitates expedition,<sup>130</sup> but focused little on the minimum protections for creditors.<sup>131</sup>

In *Chrysler*,<sup>132</sup> the U.S. government exerted its hefty leverage on the debtor and the court to get the sale done unprecedentedly quickly.<sup>133</sup> In the sale agreement, product liability claimants were cut off and the secured creditors' priorities were ignored, in favor of retirees.<sup>134</sup> Since the sales agreement formed New Chrysler, some critics argued that Chrysler was not a sale at all, but a hurried reorganization.<sup>135</sup> Fiat was the asset buyer, but it had no money at stake: the U.S. government provided financing for the deal.<sup>136</sup> Since Fiat had nothing to lose, it would never have walked away from the deal,<sup>137</sup> but a drawn out process was not in the interest of the U.S. government.<sup>138</sup> After the sale's approval, the court denied the Indiana Pensioners' request for a stay pending

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<sup>127</sup> Adler, *supra* note 29; E.g., Brubaker & Tabb, *supra* note 44; David, *supra* note 26; Roe & Skeel, *supra* note 29.

<sup>128</sup> Ashby Jones & Mike Spector, *Creditors Cry Foul at Chrysler Precedent*, WALL ST. J., June 13, 2009, at B1.

<sup>129</sup> Fishman & Gouveia, *supra* note 36.

<sup>130</sup> See *supra* note 26.

<sup>131</sup> See Bussel & Klee, *supra* note 37, at 666 (suggesting that "legitimacy was unduly sacrificed for expediency" in these cases).

<sup>132</sup> *In re Chrysler LLC*, 405 B.R. 84, 89 (Bankr. S.D.N.Y. 2009), *aff'd sub nom.* Ind. State Police Pension Trust v. Chrysler LLC (*In re Chrysler LLC*), 576 F.3d 108, 111 (2d Cir. 2009), *aff'd*, 556 U.S. 960, 960 (2009), *vacated*, 130 S. Ct. 1015 (2009), *remanded* 592 F.3d 370 (2d Cir. 2010).

<sup>133</sup> See Roe & Skeel, *supra* note 29, at 750.

<sup>134</sup> Secured creditors only received \$0.29 on the dollar. *Id.* at 730–33.

<sup>135</sup> *Id.* at 759.

<sup>136</sup> *Chrysler*, 405 B.R. at 90–92.

<sup>137</sup> Roe & Skeel, *supra* note 29, at 750.

<sup>138</sup> *Id.*

appeal.<sup>139</sup> The court cited the same reasoning that led it to approve the emergency sale—the necessity of the sale for a successful reorganization—and did not address the merits of the movants' objections.<sup>140</sup>

Similarly, in *GM*, the court's authorization order emphasized the threat to the debtor of not consummating the sale quickly.<sup>141</sup> The court noted that the continuing loss of revenue and market share would have grave effects and the sale had to go forward to avoid liquidation.<sup>142</sup> Like in *Chrysler*, there was no true market valuation of the assets sold.<sup>143</sup> The sale took place too quickly and bidding was restricted to bidders willing to accept the United Auto Workers' liabilities as a condition of purchase.<sup>144</sup> Although this pre-condition lowered the sale value, the court said it was acceptable because the price was greater than what the bidders would have received through liquidation.<sup>145</sup>

### 1. Exception or the Rule? The Impact of Chrysler and GM

Although these cases were exceptional, they set precedent for rushing through sales and past procedural safeguards. Despite suggestions that *Chrysler* and *GM* were exceptional bankruptcy situations,<sup>146</sup> this Comment argues that the rule of law must prevail even in the so-called exceptional case. The Code grants judges discretion for these exceptional cases, within certain parameters; these extraordinary cases, which curtail creditor protections, call for sparse usage, not universal applicability.<sup>147</sup>

Arguing for the necessity of the expeditious sales, the debtors in both *Chrysler* and *GM* did not give narrow emergency justifications, but rather justifications difficult to distinguish from those present in all large

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<sup>139</sup> *In re Chrysler LLC*, No. 009-50002 AJG, 2009 WL 7386569, at \*1 (Bankr. S.D.N.Y. May 20, 2009).

<sup>140</sup> The movants claimed that the order was not legal under title 11 and also questioned the constitutionality of the sale. *Id.* at \*3. The Supreme Court vacated the appeal as moot without the addressing any issues of constitutionality. *Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 130 S. Ct. 1015 (2009), *remanded*, 592 F.3d 370 (2d Cir. 2010).

<sup>141</sup> *See In re Gen. Motors Corp.*, 407 B.R. 463, 485 (Bankr. S.D.N.Y. 2009).

<sup>142</sup> *Id.* at 484; *see also* Debtors' Motion to Approve the Sale at 5, *In re Gen. Motors Corp.*, 409 B.R. 24 (Bankr. S.D.N.Y. 2009) (No. 09-50026), 2009 WL 1529573.

<sup>143</sup> Adler, *supra* note 29, at 312.

<sup>144</sup> *Id.*

<sup>145</sup> *Gen. Motors*, 407 B.R. at 485.

<sup>146</sup> Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 AM. BANKR. L.J. 531, 531 (2009); *see* A. Joseph Warburton, *Understanding the Bankruptcies of Chrysler and General Motors: A Primer*, 60 SYRACUSE L. REV. 531, 579 (2010) (outlining critics and supporters views of the two bankruptcies).

<sup>147</sup> *See infra* Part II.D.5.b.

bankruptcies. In both cases, the courts relied on the fact that the financiers conditioned their commitment upon the consummation of the deal within a short time frame.<sup>148</sup> In *Chrysler*, the U.S. government set a sixty-day deadline to resolve the bankruptcy, but it is unclear why this deadline was imperative.<sup>149</sup> Chrysler argued that without assurance of the deal's speedy consummation, consumer confidence would decline and Chrysler would not be able to secure its supplier or dealer networks.<sup>150</sup> Its failure would lead to the loss of thousands of jobs and have a domino effect within the auto industry because of Chrysler's prominence.<sup>151</sup> Nonetheless, Chrysler did not provide evidence that the deal could not be consummated without holding the judicial system hostage to an expedited process.

Any financier can make demands based upon arbitrary deadlines. Most buyers would prefer that a purchase close as soon as possible, particularly since once that sale closes, the sale is enshrouded from appeal. It is difficult to imagine any large bankruptcy that does not have grave impacts on employees, distribution channels, and customers. The melting ice cube illustrated by these cases imported mere speculative threats of harm—the impending threat of loss of confidence and subsequent failure—as justification for expedition of rights.

These cases demonstrated the potential for abuse when there is one powerful creditor—here, the U.S. government.<sup>152</sup> A large creditor or dominating force in an industry could also exert the imposing influence that the government did in these cases.<sup>153</sup> In *Chrysler*, a government-imposed deadline propelled the court to work through 850 objections in three days.<sup>154</sup> With little time to prepare their objections, and severely abridged time for court consideration, creditor's grievances unlikely received thorough consideration. An expedited proceeding, where the balance of information and control of reorganization heavily favors the debtor, provides ample opportunity to cut off creditors with little power.<sup>155</sup>

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<sup>148</sup> Roe & Skeel, *supra* note 29, at 750 (explaining that the U.S. Treasury was simultaneously preparing the GM deal and would unlikely walk if the deal was not approved on the June 15 deadline).

<sup>149</sup> *Id.*

<sup>150</sup> See Memorandum of Law in Support of Motion to Debtors and Debtors in Possession at 11–12, *In re Old Carco LLC*, No. 09-50002, 2011 WL 2752222 (Bankr. S.D.N.Y. May 2, 2011), 2009 WL 5131346.

<sup>151</sup> See *id.* at 12–13.

<sup>152</sup> Adler, *supra* note 29, at 315.

<sup>153</sup> Cf. Brubaker & Tabb, *supra* note 44, at 1405–06.

<sup>154</sup> Micheline Maynard, *Automakers' Swift Cases in Bankruptcy Shock Experts*, N.Y. TIMES, July 7, 2009, at B1.

<sup>155</sup> See Roe & Skeel, *supra* note 29, at 763 (suggesting that the government does not need to be entity providing the funding to exert its power).

## 2. A Roadmap for Impatient Buyers

Recent cases from the Bankruptcy Court for the Southern District of New York demonstrate the precedential value *Chrysler* and *GM* had in allowing buyers to demand a quick process.<sup>156</sup> In *In re GSC*, the court relied on both *GM* and *Chrysler* to approve a quick sale of all the debtor's assets to Black Diamond.<sup>157</sup> In *GSC*, the court focused on the business justification for the sale. Citing *GM*, the court reasoned that without the sale, the assets would lose value and consumer confidence would decline.<sup>158</sup> For *GSC*, the court appointed a trustee to manage the reorganization and relied on the trustee's consideration and rejection of four alternative courses of actions before pursuing the sale to Black Diamond.<sup>159</sup> More troubling was the court's treatment of Black Diamond's demands for the sale. The court approved the quick sale because it reasoned that even if Black Diamond would have waited through any delays, Black Diamond was unlikely to offer the same value in the future because of the additional administrative costs.<sup>160</sup> The court reasoned that any delay would expose the company to the unnecessary risk of losing key employees and diminishing investor confidence.<sup>161</sup>

By accepting a speculative threat of suboptimal results of *GSC*'s reorganization, the court provided an instruction manual for impatient buyers to hold the procedural protections of bankruptcy hostage. All reorganizations benefit from speed,<sup>162</sup> but the justification for expedition must weigh the rights being abridged more heavily than a mere possibility of suboptimal consequences from the lack of speed. If a debtor's management has a preferred buyer (the sale to whom flouts the best interests of the creditors), this instruction manual could guide the demands a buyer should make to ensure a speedy sale authorization.

The § 363 process heavily favors debtors; dissatisfied creditors must produce very compelling evidence before their interests could counter the

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<sup>156</sup> *E.g.*, *In re GSC, Inc.*, 453 B.R. 132, 155 (Bankr. S.D.N.Y. 2011); *In re Bos. Generating, LLC*, 440 B.R. 302, 329 (Bankr. S.D.N.Y. 2010); *In re Metaldyne Corp.*, 409 B.R. 671, 678 (Bankr. S.D.N.Y. 2009), *aff'd*, 421 B.R. 620 (S.D.N.Y. 2009).

<sup>157</sup> *GSC, Inc.*, 453 B.R. 132, 166 (Bankr. S.D.N.Y. 2011).

<sup>158</sup> *Id.* (citing *In re Gen. Motors*, 407 B.R. 463, 492–93).

<sup>159</sup> *See id.*

<sup>160</sup> *Id.* at 166–67.

<sup>161</sup> *Id.* at 169.

<sup>162</sup> *See supra* Part I.A.1.

debtor's assertions. Unfair treatment would be curbed by imposing a more rigid burden of evidence to speed past due process safeguards.<sup>163</sup>

### B. Valid Business Purpose & Potential Conflicts of Interests

Historically, courts skeptical of sales outside of chapter 11 required a showing of an emergency before approving a sale.<sup>164</sup> Today, courts give more deference to the reorganizing company's management and only require a valid business purpose for a sale.<sup>165</sup>

A valid business purpose is necessary for both the sale and not waiting for a reorganization plan to complete the sale.<sup>166</sup> *In re Lionel* gave rise to the valid business purpose test, which recognized that while bankruptcy judges need flexibility to fashion relief and facilitate successful reorganizations, flexibility does not give debtors *carte blanche* to evade the Code.<sup>167</sup> The valid business purpose test listed non-exclusive factors for consideration of a sale motion: proportionate value of assets to the whole business, amount of time elapsed since the filing, likelihood a plan of reorganization will be proposed and confirmed in the near future, effects of proposed disposition on future reorganization, proceeds to be obtained, the § 363 method of disposition, and whether the asset is increasing or decreasing in value.<sup>168</sup> The *Lionel* factors rely on the notion that the disposition of assets is an incremental step of the plan process, not a means of disposing of the bankruptcy case altogether (as § 363 sales are commonly used now).<sup>169</sup> Because of the transformation in how debtors employ § 363, some courts have suggested a new set of criteria for evaluating motions for a sale.<sup>170</sup>

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<sup>163</sup> See generally Russell A. Eisenberg & Frances F. Gecker, *The Doctrine of Necessity and Its Parameters*, 73 MARQ. L. REV. 1 (1989).

<sup>164</sup> COLLIER, *supra* note 10, ¶ 363.02 (citing *In re Solar Mfg. Corp.*, 176 F.2d 493 (3d Cir. 1949)).

<sup>165</sup> *Id.*

<sup>166</sup> *In re Bos. Generating, LLC*, 440 B.R. 302, 329 (Bankr. S.D.N.Y. 2010).

<sup>167</sup> *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel)*, 722 F.2d 1063, 1071 (2d Cir. 1983).

<sup>168</sup> *Id.*

<sup>169</sup> *Supra* notes 3–4 and accompanying text; see Baird, *supra* note 3, at 81.

<sup>170</sup> See generally *In re Chrysler LLC*, 405 B.R. 84, 95 (Bankr. S.D.N.Y. 2009), *aff'd sub nom. Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 111 (2d Cir. 2009), *aff'd*, 556 U.S. 960, 960 (2009), *vacated*, 130 S. Ct. 1015 (2009), *remanded*, 592 F.3d 370 (2d Cir. 2010) (explaining that whether an asset is a “melting ice cube” with decreasing value and little prospect of continuing business operations is the overriding factor); see also Jessica Uziel, Comment, *Section 363(B) Restructuring Meets the Sound Business Purpose Test with Bite: An Opportunity to Rebalance the Competing Interests of Bankruptcy Law*, 159 U. PA. L. REV. 1189, 1196 (2011) (discussing factors adopted in *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 418 (Bankr. S.D. Tex. 2009)).

The *GM* court embraced the *Lionel* factors but expanded upon them.<sup>171</sup> It listed four additional factors:

1. Does the estate have the liquidity to survive until confirmation of a plan?
2. Will the sale opportunity still exist as of the time of plan confirmation?
3. If not, how likely is it that there will be a satisfactory alternative sale opportunity, or a stand-alone plan alternative that is equally desirable (or better) for creditors?
4. Is there a material risk that by deferring the sale, the patient will die on the operating table?<sup>172</sup>

Careful to assert that it was not departing from § 363 precedent, the court explained that these supplemental factors still address *Lionel*'s original question of whether there is a good reason to confirm the sale prior to the confirmation of a plan.<sup>173</sup> These supplemental factors rest on the DIP's speculation on the necessity of the sale, rather than the more objective *Lionel* factors. The deference afforded in these "supplemental" factors nonetheless suggests they do supplant the *Lionel* factors.<sup>174</sup>

In *GM*, the court focused on plummeting consumer confidence as the impetus for completing the sale quickly.<sup>175</sup> Despite acknowledging that the U.S. government would not walk away if the court took extra time for authorization, the court approved the quick sale because no other qualified bidders would emerge before the assets deteriorated in value.<sup>176</sup> Guided by this precedent, the *In re Boston Generating* court applied these new factors to find that the debtor did not have sufficient liquidity to survive until confirmation of a plan, given the costs and time of confirming a contested plan.<sup>177</sup>

The *Lionel* valid business purpose threshold for approving a sale derives from a wealth of corporate law holding that managers are better suited to make business decisions, but the valid business purpose test does not capture the

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<sup>171</sup> *In re Gen. Motors*, 407 B.R. 463, 490 (Bankr. S.D.N.Y. 2009).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> *Id.* at 492.

<sup>176</sup> *Id.* at 492–93.

<sup>177</sup> *In re Bos. Generating, LLC*, 440 B.R. 302, 328–29 (Bankr. S.D.N.Y. 2010).



same skepticism with regards to conflicts of interest. In corporate law, as long as the management acted in good faith and with due care in making decisions, judges will not second guess business judgments in retrospect.<sup>178</sup> Bankruptcy courts recognize that same principle: judges are no better equipped for making business decisions for insolvent companies than solvent ones.<sup>179</sup>

Corporate law affords less deference when self-interest may cloud management's judgment.<sup>180</sup> While bankruptcy courts are skeptical of "insider"<sup>181</sup> transactions, conflicts of interest other than those enumerated by Code's definition of "insider" may arise. Though large creditors as buyers in § 363 sales raise similar concerns to those created by insider transactions, they do not fit within this definition. A debtor's management is inevitably biased in favor of survival rather than economic efficiency or fair distribution to creditors.<sup>182</sup> By calling the bluff of a powerful creditor exerting leverage, management runs the risk of dooming the reorganization and its own job security.<sup>183</sup> In bankruptcy, management's prior incentives as equity holders<sup>184</sup> disappear since equity interests are subordinate to creditors,<sup>185</sup> thus, management has little to lose by acceding to buyer demands.<sup>186</sup> Buyers can use this leverage to manufacture a valid business purpose to get the sale done as quickly as possible.<sup>187</sup> Once the sale order is final, appeals of the sale are moot.

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<sup>178</sup> *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) ("The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." (internal quotation marks omitted) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984))).

<sup>179</sup> *Agarwal v. Pomona Valley Med. Grp. (In re Pomona Valley Med. Grp.)*, 476 F.3d 665, 670 (9th Cir. 2007). However, other countries automatically remove existing management once a company is insolvent, believing insolvency demonstrates their ineptitude. Ziad Raymond Azar, *Bankruptcy Policy: A Review and Critique of Bankruptcy Statutes and Practices in Fifty Countries Worldwide*, 16 CARDOZO J. INT'L & COMP. L. 279, 289–301 (2008) (outlining rationales for displacing management in bankruptcy).

<sup>180</sup> *E.g.*, DEL. CODE. ANN. tit. 8, §§ 144, 271 (2012); REVISED MODEL BUS. CORP. ACT §§ 8.61, 12.02 (2008).

<sup>181</sup> *See* 11 U.S.C. § 101(31)(b) (2006).

<sup>182</sup> Charles Jordan Tabb, *Emergency Preferential Orders in Bankruptcy Reorganizations*, 65 AM. BANKR. L.J. 75, 79 (1991) (citing *Otte v. Mfrs. Hanover Commercial Corp. (In re Texlon Corp.)*, 596 F.2d 1092, 1098 (2d Cir. 1979); *In re FCX, Inc.*, 54 B.R. 833, 838 (Bankr. E.D.N.C. 1985)).

<sup>183</sup> Tabb, *supra* note 182, at 79.

<sup>184</sup> Corporations often align corporate and managerial interests through equity ownership. Tabb, *supra* note 182, at 79.

<sup>185</sup> *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 120 (1939) (stating it has long been a tenet of bankruptcy that debt creditors are entitled to priority over stockholders).

<sup>186</sup> Tabb, *supra* note 182, at 79.

<sup>187</sup> *See infra* Part II.A.2.

### C. Interpretations of Section 363(m) Mootness

There is broad agreement among courts on the importance of protecting good faith buyers, but the interpretation of § 363(m)'s breadth is not consistent among circuits.<sup>188</sup> Many courts interpret § 363(m) to mandate a per se mootness rule anytime the appellant did not obtain a stay pending appeal, but some courts recognize narrow exceptions to the rule.<sup>189</sup> These exceptions seek to remedy errors against creditors when such relief would not undermine finality.

#### 1. The Per Se Rule

Many courts read § 363(m) broadly and adopt a per se rule that any appeal will be moot unless the movant obtained a stay.<sup>190</sup> These courts hold that mootness applies even if the appeal would raise a question of whether property belonged to the estate<sup>191</sup> or whether the issuing court had proper jurisdiction.<sup>192</sup> Courts that observe the per se rule find that even if the bankruptcy court erred in authorizing the sale, the appeal must be dismissed.<sup>193</sup> Discussing the breadth of statutory mootness after denying an appeal, the Seventh Circuit, in *In re Sax*, explained that whether the court acted correctly does not matter, because “[s]ection 363(m) does not say that the sale must be *proper* under § 363(b); it says the sale must be *authorized* under § 363(b).”<sup>194</sup> This reasoning produces an absurd result by which a court can act outside the scope of its authority, and

<sup>188</sup> Compare *In re Sax*, 796 F.2d 994 (7th Cir. 1986), with *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490 (3d Cir. 1998).

<sup>189</sup> Despite the narrow exceptions, it is unclear whether these exceptions apply in any significant or consistent way. *Kuney*, *supra* note 107. For example, *In re Rickel Home Centers, Inc.*, 209 F.3d 291 (3d Cir. 2000) acknowledges the exception created in its circuit by *Krebs*, but reasons it does not apply in the case at bar.

<sup>190</sup> E.g., *Parker v. Goodman (In re Parker)*, 499 F.3d 616, 620–21 (6th Cir. 2007) (declining to adopt the Third Circuit's approach); *Sax*, 796 F.2d at 997; *United States v. Salerno*, 932 F.2d 117, 122–23 (2d Cir. 1991); *Anheuser-Busch, Inc. v. Miller (In re Stadium Mgmt. Corp.)*, 895 F.2d 845, 847 (1st Cir. 1990); *Cargill, Inc. v. Charter Int'l Oil Co. (In re Charter Co.)*, 829 F.2d 1054 (11th Cir. 1987); *Magwood v. Pearlstein (In re Magwood)*, 785 F.2d 1077, 1080–81 (D.C. Cir. 1986).

<sup>191</sup> See, e.g., *Hazelbaker v. Hope Gas, Inc. (In re Rare Earth Minerals)*, 445 F.3d 359, 364 (4th Cir. 2006) (quoting *Sax*, 796 F.2d at 997–98); *Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43, 54–55 (S.D.N.Y. 2010). But see *Rutherford Hosp., Inc. v. RNH P'ship*, 168 F.3d 693, 699 (4th Cir. 1999).

<sup>192</sup> *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992) (holding collateral appeals are not permissible); *In re Gilchrist*, 891 F.2d 559, 561 (5th Cir. 1990) (holding that finality precludes reversal because the appellant forfeited the opportunity to contest jurisdiction by not obtaining a stay).

<sup>193</sup> See, e.g., *Rare Earth Minerals*, 445 F.3d 363; *Canzano v. Ragosa (In re Colarusso)*, 382 F.3d 51, 62 (1st Cir. 2004).

<sup>194</sup> *Sax*, 796 F.2d at 997–98.

then be immune to future review.<sup>195</sup> The *Sax* court explained that allowing reversal of the sale, despite lack of jurisdiction, would contravene the finality goals of 363(m).<sup>196</sup> Because looking for exceptions would undermine the purpose of the provision, § 363(m) must be followed “precisely.”<sup>197</sup> The court urged that the appellant should have obtained a stay immediately, and not doing so foreclosed the opportunity to appeal.<sup>198</sup> Statutory mootness operates to preclude review and protect the good faith buyer, and whether the bankruptcy court’s action was substantively wrong in authorizing the sale is irrelevant.<sup>199</sup>

## 2. Carving Holes into Statutory Mootness: Exceptions to the Rule

Faced with the harshness of the per se rule, in the late 1990s, courts began exhibiting more willingness to review appeals.<sup>200</sup> These courts reasoned that the plain language of § 363(m) does not preclude *any* relief, just the reversal or modification of the sale; thus, courts still have a duty to examine the feasibility of relief.<sup>201</sup> Seeking to avoid a per se rule’s stark treatment to wronged

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<sup>195</sup> *Parker v. Goodman (In re Parker)*, 499 F.3d 616, 623 (6th Cir. 2007) (citing *Charter*, 829 F.2d at 1055–56); see also *Rare Earth Minerals*, 445 F.3d at 364 (explaining an exception to statutory mootness whenever a claimant asserts the property was not property of the estate would destroy the rule altogether). *But see Rutherford Hosp., Inc.*, 168 F.3d at 699 (holding that the bankruptcy court does not have jurisdiction to allow a conveyance of property not part of the estate).

<sup>196</sup> *Sax*, 796 F.2d at 998.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 997–98.

<sup>199</sup> *Canzano v. Ragosa (In re Colarusso)*, 382 F.3d 51, 62 (1st Cir. 2004) (quoting *Tri-Can, Inc. v. Fallon (In re Tri-Can, Inc.)*, 98 B.R. 609, 618 (Bankr. D. Mass. 1989)); John M. Collen, *Section 363(m) Title Endorsements*, 4 J. BANKR. L. & PRAC. 531, 536 (1995) (citing *United Mine Workers of Am. Combined Fund v. CF & I Fabricators (In re CF & I Fabricators)*, 169 B.R. 984, 992 (D. Utah 1994)). *Contra Cal-Bay Int’l, Inc. v. Supertail Mfg. Co. (In re Supertrail Mfg. Co.)*, 383 F. App’x 475, 478 (5th Cir. 2010) (holding that § 363(m) does not apply to assets not in the bankruptcy estate).

<sup>200</sup> *E.g., Contrarian Funds LLC v. Aretex LLC (In re Westpoint Stevens, Inc.)*, 600 F.3d 231, 249 (2d Cir. 2010) (noting there may be a narrow exception when the challenge is divorced from the overall transaction and would not affect any of the purchaser’s reliance); Official Comm. of Unsecured Creditors v. Trism, Inc. (*In re Trism, Inc.*), 328 F.3d 1003, 1006–07 (8th Cir. 2003) (holding there could be a narrow exception so long as the challenge would not affect the validity of the sale); *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 498–99 (3d Cir. 1998) (discussing the courts which adopt the majority approach and announcing an exception); *Bullock v. Telluride Income Growth LP (In re Telluride Income Growth LP)*, 364 B.R. 407, 414 (B.A.P. 10th Cir. 2007) (holding that a remedy “can be granted without affecting the validity of the sale”).

<sup>201</sup> *In re AOV Indus., Inc.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986); see also *Bank of N.Y. Trust Co. v. Official Unsecured Creditors’ Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 241 (5th Cir. 2009); *Trans World Airlines, Inc. v. Texaco, Inc. (In re Texaco Inc.)*, 92 B.R. 38, 44–45 (S.D.N.Y. 1988).

creditors, courts mimic the approach to equitable mootness.<sup>202</sup> These courts consider whether they can fashion any relief before mooting an appeal for which a stay pending appeal was not obtained.<sup>203</sup> Despite rejecting the per se rule, these courts carve out a narrow exception in which mootness will not operate—the strong policy favoring finality typically prevails.<sup>204</sup>

The exception view considers two factors before mooting an appeal: (1) whether there was a stay; and (2) whether the reversal or modification of the authorization would affect the validity of the sale.<sup>205</sup> This construction of the exception imports no analysis outside of the words in § 363(m).<sup>206</sup> The presence of a state law remedy, for instance, does not render the appeal on the merits moot.<sup>207</sup> Courts have interpreted several other situations falling under this exception: the creditor-purchaser is party to the appeal and the court can exercise equitable principles to reverse the sale;<sup>208</sup> the liquidation of assets in a commercially unreasonable manner, such as a fraudulent transfer;<sup>209</sup> and appeals concerning the distribution of the proceeds of the closed sale.<sup>210</sup> To moot an appeal, the proponent of mootness must demonstrate that there is no remedy available to the appellant.<sup>211</sup> Courts reject motions for mootness when

<sup>202</sup> See *Manges v. Seattle-First Nat'l Bank (In re Magnes)*, 29 F.3d 1034, 1040 (5th Cir. 1994); see also *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002) (explaining that courts apply a “totality of circumstances” test before mooting an appeal).

<sup>203</sup> See *supra* note 200 and accompanying text; see also *Colarusso*, 382 F.3d at 62 (quoting *Tri-Can, Inc.*, 98 B.R. at 618). *Contra Cal-Bay Int'l, Inc. v. Supertail Mfg. Co. (In re Supertrail Mfg. Co.)*, 383 F. App'x 475, 478–81 (5th Cir. 2010) (holding that § 363(m) does not apply to assets not in the bankruptcy estate).

<sup>204</sup> *Contrarian Funds LLC v. Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F.3d 231, 248–49 (2d Cir. 2010) (discussing the goal of protecting good faith buyers); see also *Kuney, supra* note 107.

<sup>205</sup> *Cinicola v. Scharffenberger*, 248 F.3d 110, 128 (3d Cir. 2001) (citing *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998)); see also *Mission Iowa Wind Co. v. Enron Corp. (In re Enron Corp.)*, 291 B.R. 39, 41–42 (S.D.N.Y. 2003).

<sup>206</sup> See *supra* Part I.B.

<sup>207</sup> *Suter v. Goedert*, 504 F.3d 982, 990–91 (9th Cir. 2007). On remand, the district court upheld the bankruptcy court's finding against the appellants, after the court considered the matter on the merits. *Suter v. Goedert (In re Suter)*, 396 B.R. 535 (D. Nev. 2008).

<sup>208</sup> *Sun Valley Ranches, Inc. v. Equitable Life Assurance Soc'y (In re Sun Valley Ranches, Inc.)*, 823 F.2d 1373, 1375 (9th Cir. 1987); see also *Taylor v. Lake (In re CADA Inv., Inc.)*, 664 F.2d 1158, 1160 (9th Cir. 1981); *Willamette Water Front, Ltd. v. Victoria Station, Inc. (In re Victoria Station Inc.)*, 88 B.R. 231, 234 (B.A.P. 9th Cir. 1988). *Contra Gwinnett Bank & Trust Co. v. Matos (In re Matos)*, 790 F.2d 864, 856 n.3 (11th Cir. 1986) (rejecting any contrast between statutory rights of redemption and sale of stock).

<sup>209</sup> *Hicks v. Brandt (In re Healthco Int'l, Inc.)*, 136 F.3d 45, 50–51 (1st Cir. 1998).

<sup>210</sup> *In re Lloyd*, 37 F.3d 271, 273 (7th Cir. 1994); *United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991) (holding that while an appeal concerning a sale order was moot, appellant was free to object to the distribution of the proceeds).

<sup>211</sup> See *Osborn v. Durant Bank & Trust Co. (In re Osborn)*, 24 F.3d 1199, 1203 (10th Cir. 1994), *abrogated in part on other grounds by Eastman v. Union Pacific R.R. Co.*, 493 F.3d 1151 (10th Cir. 2007),

the movant fails to establish that there is no meaningful remedy available without invalidating the sale.<sup>212</sup>

In 1998, the Third Circuit explicitly rejected a per se rule in *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, holding that an appeal is not moot if relief can be fashioned without affecting the validity of the sale.<sup>213</sup> Despite creating an exception, the court nonetheless dismissed appeal at bar as moot because any remedy would have affected the validity of the sale.<sup>214</sup> Circuit precedent dictated that any kind of attack on the sale price would impermissibly affect the validity of the sale.<sup>215</sup> In *Krebs*, the appellant argued that a refund would come from another creditor (who was also the buyer), not an innocent third party.<sup>216</sup> The court stated that the statute does not differentiate between buyers who are creditors and third-party buyers.<sup>217</sup> The policy of finality prevailed because not mooting the sale would make bidders fear that the winning bid may not be the final sale price.<sup>218</sup>

Although several circuits have embraced a similar exception, the breadth of what constitutes a challenge to the validity of the sale leaves unclear what kind of relief is possible, since nearly anything could challenge the validity of the sale. In *In re Trism*, the Eighth Circuit Court of Appeals interpreted “affecting the validity of the sale” as anything on which the purchaser relied when agreeing to the purchase.<sup>219</sup> The court defined a provision as unalterable on appeal under § 363(m) if it is so closely linked to the agreement that modifying or reversing it would adversely affect the parties’ bargained-for-exchange.”<sup>220</sup>

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*abrogated by Shayesteh v. Raty*, 404 F. App’x. 298, (10th Cir. 2010) (holding that federal principles of judicial estoppel apply to both federal and pendent state-law claims but not addressing when mootness operates).

<sup>212</sup> C.O.P. Coal Dev. Co. v. C.W. Mining Co. (*In re C.W. Mining Co.*), 641 F.3d 1235, 1239 (10th Cir. 2011); Search Mkt. Direct, Inc. v. Jubber (*In re Paige*), 584 F.3d 1327, 1336–37 (10th Cir. 2009); *Suter*, 504 F.3d at 986–87.

<sup>213</sup> *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998) (rejecting the per se rule, based on the interpretation of Third Circuit precedent in *Resolution Trust Corp. v. Swedeland Dev. Grp., Inc.* (*In re Swedeland Dev. Grp., Inc.*), 16 F.3d 552 (3d Cir. 1994) (en banc) that 11 U.S.C. § 364(e) does not provide that § 363(m) moots every appeal without a stay).

<sup>214</sup> *Krebs Chrysler-Plymouth*, 141 F.3d at 500.

<sup>215</sup> *Id.* (relying on *Pittsburgh Food & Beverage Inc. v. Ranallo*, 112 F.3d 645 (3d Cir. 1997)).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* (citing *Pittsburgh Food & Beverage*, 112 F.3d at 645).

<sup>219</sup> Official Comm. of Unsecured Creditors v. Trism, Inc. (*In re Trism, Inc.*), 328 F.3d 1003, 1006–07 (8th Cir. 2003). This provision was a release from any liability on avoidance claims for the majority shareholder. *Id.* at 1006.

<sup>220</sup> *Id.* at 1007.

Although some courts and scholars contend that the exception to the per se rule is virtually toothless,<sup>221</sup> it incorporates equitable principles to ensure that if an injustice *can be* remedied without undermining finality, the court should do so. Advocates of a per se rule may contend that leaving the door open to even a sliver of contention whether mootness will operate undermines the motivations for a strong a policy of finality;<sup>222</sup> a buyer may worry that her case *might* fit into that ambit of the mysterious exception.<sup>223</sup> However, narrowing § 363(m) to allow creditors an equitable form of relief has not deterred § 363 sales since the exception's articulation over a decade ago in Delaware's circuit, where sales have dramatically increased.<sup>224</sup>

### 3. *Clear Channel*

In 2008, a Bankruptcy Appellate Panel of the Ninth Circuit decision further chipped away at § 363(m) by holding that the mootness provision does not apply to subsection (f) of § 363 but only to subsections (b) and (c), in *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*.<sup>225</sup> The court's reasoning focused on a plain language reading of the statute.<sup>226</sup> Other circuits declined to follow this decision because it was against the weight of authority and subsection (f) only operates in conjunction with sales under subsection (b), thereby requiring the same mootness protections.<sup>227</sup> In contrast with the Ninth Circuit's narrow reading of the § 363(m), the Sixth Circuit applied § 363(m) to subsections (f) and (h).<sup>228</sup> Courts that rejected Ninth Circuit's reasoning held that buyers rely on the "free and clear" provision of § 363(f), and disturbing it

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<sup>221</sup> *Contrarian Funds LLC v. Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F.3d 231, 249 (2d Cir. 2010) (citing *Kuney*, *supra* note 107, at 271–72) (explaining the exception is so narrow, that for practical purposes, the Third Circuit has a per se rule).

<sup>222</sup> *In re Sax*, 796 F.2d 994, 997–98 (7th Cir.1986) (discussing that any exception would undermine finality).

<sup>223</sup> *Collen*, *supra* note 199, at 532 (discussing clients who are still skeptical that mootness will protect them).

<sup>224</sup> See *infra* Appendix A, Chart 2.

<sup>225</sup> *Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25, 35–36 (B.A.P. 9th Cir. 2008); see also 11 U.S.C. § 363(f) (2006); *supra* text accompanying note 12 (explaining § 363(f)).

<sup>226</sup> The court noted that because the text of § 363(m) reads "[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity," it does not apply to § 363(f). *Clear Channel*, 391 B.R. at 35 (emphasis added).

<sup>227</sup> See Official Comms. of Unsecured Creditors v. Anderson Senior Living Props., LLC (*In re Nashville Senior Living, LLC*), 407 B.R. 222, 231 (B.A.P. 6th Cir. 2009) (discussing the courts that adopt its approach and finding that ultimately, the sale is made pursuant to subsection (b) or (c)), *aff'd*, 620 F.3d 584 (6th Cir. 2010).

<sup>228</sup> *Id.* at 228, 231. Section 363(h) pertains to the sale of co-owned property. See 11 U.S.C. § 363(h).

would alter the parties' bargained-for exchange and thereby challenge the sale's validity.<sup>229</sup>

Since the *Clear Channel* decision, courts, including those in the Ninth Circuit, have continued to apply § 363(m) to § 363(f).<sup>230</sup> Appellants may attempt to use *Clear Channel* as strategic leverage to try to circumvent mootness, but the result of *Clear Channel* was yet another equitable exception to § 363(m), with limited applicability.<sup>231</sup> The Ninth Circuit BAP's purpose was to avoid § 363(m)'s harsh results. Before assessing statutory mootness, the *Clear Channel* court first determined the decision was not equitably moot.<sup>232</sup> Recognizing the unfairness in denying an appeal when relief could still be equitably granted, the court then crafted an explanation as to why § 363(m) did not apply under the circumstances.<sup>233</sup>

After the court's decision, critics posited the death of § 363 sales, at least in the Ninth Circuit.<sup>234</sup> Yet, three years later, evidence has not borne out these claims.<sup>235</sup> Data indicates that motions for § 363 used sales in the Ninth Circuit do not vary from the trends in the most frequently used courts for § 363 motions—the Southern District of New York and the District of Delaware.<sup>236</sup>

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<sup>229</sup> Asset Based Res. Grp., LLC v. U.S. Trustee (*In re* Polaroid Corp.), 611 F.3d 438, 441 (8th Cir. 2010) (citing Official Comm. of Unsecured Creditors v. Trism, Inc. (*In re* Trism, Inc.), 328 F.3d 1003, 1007 (8th Cir. 2003)); GAF Holdings, LLC v. Rinaldi (*In re* Farmland Indus.), 408 B.R. 497, 508–09 (B.A.P. 8th Cir. 2009).

<sup>230</sup> See, e.g., *In re* Thorpe Insulation Co., No. 11-688 DSF, 2011 WL 1378537, at \*1 (C.D. Cal. Apr. 11, 2011); *In re* Namco Capital Grp., Inc., No. 10-0766 GAF, 2011 WL 2312090, at \*2–3 (C.D. Cal. June 7, 2011); *In re* Jolan, Inc., 403 B.R. 866, 867–69 (Bankr. W.D. Wash. 2009) (denying the motion but holding that *Clear Channel* does not prohibit such use of § 363).

<sup>231</sup> James T. Markus, et al., Recent Developments in Asset Sales, in AMERICAN BANKRUPTCY INSTITUTE THIRD HAWAII BANKRUPTCY WORKSHOP, at \*2–3 (2010), available at Westlaw, 081110 ABI-CLE 23.

<sup>232</sup> *Clear Channel Outdoor, Inc. v. Knupfer* (*In re* PW, LLC), 391 B.R. 25, 33–35 (B.A.P. 9th Cir. 2008).

<sup>233</sup> See *id.* at 35–37.

<sup>234</sup> See, e.g., Richard J. Corbi, Section 363(f) “Free and Clear” Sales May Not Survive Appeal, 18 NORTON J. BANKR. L. & PRAC. ART. 8 (Jan. 2009); Dennis J. Connolly & Sage M. Sigler, NORTON BANKR. L. ADVISER, Nov. 2008, available at Westlaw, 2008 No. 11 Norton Bankr. L. Adviser 2 (arguing that the terms of the sale cannot be treated separately on appeal; Joel H. Levitin et al., *Ninth Circuit BAP Dresses Down Lienstripping—Could This Be the Last Dance for 363 Sales?*, 27 AM. BANKR. INST. J., Oct. 2008, at 1, 53.

<sup>235</sup> Jo Ann J. Brighton & Felton E. Parrish, *Two Recent Decisions Show that § 363 Sales are Not Dead in the Ninth Circuit*, AM. BANKR. INST. J., July–Aug. 2009, at 42, 42–43.

<sup>236</sup> See *infra* Appendix A, Chart 3; Appendix B; see also Kenneth N. Russak, Section 363 Real Estate Sales Are Still Feasible After *Clear Channel*, L.A. LAW., Mar. 2009, at 10, 13–14 (“Rumors of the death of the 363 sale are greatly exaggerated.”); Shirley S. Cho & Bennett L. Spiegel, *Clear Channel Muddies the Waters of § 363(m) Mootness Protection*, 26 No. 2 THE BANKRUPTCY STRATEGIST 1 (Dec. 2008) (predicting *Clear Channel* will not be followed in the Ninth Circuit or elsewhere).

#### D. *The Difficulty of Getting an Appeal*

Though the exceptions to § 363(m) are narrow in scope, they aim to compensate for reversible errors made during the short authorization process. Since a creditor's efforts to secure a stay pending appeal are often unsuccessful, an equitable reading of § 363(m) may be the only opportunity for retroactively protecting creditors' due process rights.

##### 1. *The Illusive Stay Pending Appeal*

Although Rule 6004(h) provides an automatic fourteen-day stay before any sale order consummates, it grants the judge discretion to shorten or eliminate the stay.<sup>237</sup> In theory, the rule aims to avoid the race to court between a creditor (seeking to stop the sale) and a seller (seeking quick approval and mootness protection).<sup>238</sup> In practice, courts almost always eliminate the stay, given the debtor's push to complete the sale quickly.<sup>239</sup> As discussed above, a stay pending appeal is an extraordinary remedy, and parties are unlikely to succeed on their motion.<sup>240</sup>

Because Rule 6004(h) does not provide any guidance on when and why a court may eliminate this stay, courts regularly eliminate it. In contrast, Rule 2002 requires a "cause shown" standard to shorten the time mandated for notice.<sup>241</sup> Although "cause shown" is an amorphous test, the absence of this phrase in Rule 6004(h) explains the provision's lack of fortitude.<sup>242</sup> Rule 8017 explicitly limits the duration of a stay pending appeal to thirty days, unless there is cause shown to extend it.<sup>243</sup> If a potential appellant's stay cannot be extended without cause shown, the same standard should apply for purging the fourteen-day stay. The small period could be enough time for a potential appellant to petition the court for review of a meritorious appeal. Although the Rules recognize a balancing of debtors' needs against creditors' rights, the toothless rule fails to give creditors' rights much weight.

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<sup>237</sup> FED. R. BANKR. P. 6004(h).

<sup>238</sup> COLLIER, *supra* note 10, ¶ 363.11.

<sup>239</sup> Athanas, *supra* note 77.

<sup>240</sup> *See supra* Part I.C.

<sup>241</sup> FED. R. BANKR. P. 2002(a).

<sup>242</sup> *E.g., id.* 1006(b)(2), 2002(a), 3015, 9006(b)(1). However, Rule 3020 and Rule 4002 provide analogous discretion for the judge to remove a fourteen-day stay. *Id.* 3020, 4002.

<sup>243</sup> *Id.* 8017(b).



Noting the Rule's lack of guidance on when to shorten the stay, the Bankruptcy Court for the Southern District of New York in *In re Borders Group, Inc.* relied on the *Collier* treatise to interpret the Rule to have sharper teeth than most courts do.<sup>244</sup> The treatise explains that a court should not lift the stay when objections have been raised, unless there is a showing of a business need to close the sale sooner and the interests of the objecting parties likely to succeed on appeal are sufficiently protected in the amount of time afforded.<sup>245</sup> The court then balanced the interests of both parties and found that a reduced five-day stay would allow Borders to turn over its property to landlords and still give creditors sufficient notice to have their objections heard for sales of low-value assets.<sup>246</sup> In other cases, courts have waived stays when there is evidence that a delay will cause the debtor to incur additional costs,<sup>247</sup> where the debtor had no more cash<sup>248</sup> or the debtor had negative cash flow.<sup>249</sup>

## 2. *Appealing a Denial of a Motion for a Stay Pending Appeal*

An attempt to appeal the denial of a stay may come too late for relief to be possible. There are instances when a party did not obtain a stay pending appeal because of a procedural glitch: the party did not receive notice the order had been confirmed,<sup>250</sup> the parties were in settlement negotiations,<sup>251</sup> or the party learned of the sale too late and assumed seeking the stay pending appeal was futile.<sup>252</sup>

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<sup>244</sup> *In re Borders Grp., Inc.*, 453 B.R. 477, 486 (Bankr. S.D.N.Y. 2011) (citing 10 COLLIER, *supra* note 10, 6004.0111).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Yamaha Motor Corp., USA v. Perry Hollow Mgmt. Co., Inc. (In re Perry Hollow Mgmt. Co., Inc.)*, 297 F.3d 34, 41 (1st Cir. 2002).

<sup>248</sup> *Hower v. Molding Sys. Eng'g Corp.*, 445 F.3d 935, 938 (7th Cir. 2006).

<sup>249</sup> *In re Nature Leisure Times, LLC*, No. 06-41357, 2007 WL 4554276, at \*2-3 (Bankr. E.D. Tex. Dec. 19, 2007).

<sup>250</sup> *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 187 (3d Cir. 2001).

<sup>251</sup> *E.g., Contrarian Funds LLC v. Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F.3d 231, 252-53 (2d Cir. 2010).

<sup>252</sup> *In re Tempo Tech. Corp.*, 202 B.R. 363, 365, 373-74 (D. Del. 1996) (appellants learned of the sale approval when the unsecured creditors' committee formed, six days after the sale and transfer of assets occurred). However, ignorance of the law and the necessity for a stay after an expeditious proceeding is not an excuse for not obtaining a stay. *Official Comm. of Unsecured Creditors v. CIBC Woody Gundy Ventures (In re Temtechco, Inc.)*, No. 95-00596, 1998 WL 887256 (Bankr. D. Del. Dec. 18, 1998) (quoting *In re CGI Indus., Inc.*, 27 F.3d 296, 300 n.8 (7th Cir. 1994)).

As discussed above, each factor of consideration imposes a high standard for obtaining a stay pending appeal.<sup>253</sup> Finalizing a sale quickly is in the interests of the buyer and the debtor. Yet, a party that fails to get a stay will have no further remedy. While most courts hold that an appeal absent a stay is moot, some courts provide more leeway for parties that unsuccessfully moved for a stay.<sup>254</sup> Despite courts' observation of a strict mootness rule, courts have recognized the harsh results that come from the denial of a stay: no opportunity for review.<sup>255</sup>

### 3. Challenges to Good Faith

Section 363(m) explicitly provides that its protections apply only to good faith purchasers.<sup>256</sup> Today, most bankruptcy courts' sale orders include an explicit finding of good faith, but rarely incorporate specific facts evidencing good faith in the sale order.<sup>257</sup> In *In re Abbott Dairies*, the Third Circuit Court of Appeals rejected the notion that good faith was implicit in the bankruptcy judge's approval; rather, protection under § 363(m) requires an explicit finding of good faith.<sup>258</sup>

The standard for a finding of good faith is a lax one, deferential to the buyer unless there is egregious evidence to the contrary. As it is increasingly common for a creditor to be the buyer in § 363 sales, there is an imbalance of information in favor of the debtor and buyer (often the buyer-creditor).<sup>259</sup> Although a transaction between a creditor with leverage and a debtor is not

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<sup>253</sup> See *supra* Part I.C.

<sup>254</sup> See, e.g., *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144–45 (2d Cir. 2005) (citing *Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 94 F.3d 772, 776 (2d Cir. 1996)); *Cartalemi v. Karta Corp. (In re Karta Corp.)*, 342 B.R. 45, 52–53 (S.D.N.Y. 2006).

<sup>255</sup> See e.g., *Licensing by Paolo v. Sinatra (In re Gucci)*, 105 F. 3d 837, 840 (2d Cir. 1997) (“[A] district judge deciding whether to stay a bankruptcy sale pending appeal . . . should be aware that a closing occurring immediately after a stay is denied will substantially limit the scope of an appeal.” (emphasis omitted)).

<sup>256</sup> 11 U.S.C. § 363(m) (2006).

<sup>257</sup> See generally *General Order M-383*, U.S. BANKR. COURT S. DIST. N.Y., <http://www.nysb.uscourts.gov/orders/m383.pdf> (last visited Nov. 4, 2012); *Guidelines Re Sale Orders*, U.S. BANKR. COURT N. DIST. CAL., <http://www.canb.uscourts.gov/procedures/dist/guidelines/order-re-sale-orders> (last visited Nov. 4, 2012); Bob Eisenbach, *Delaware Bankruptcy Court Adopts New Local Rule for Section 363 Sales*, IN THE (RED): THE BUSINESS BANKRUPTCY BLOG, <http://bankruptcy.cooley.com/2008/02/articles/business-bankruptcy-issues/delaware-bankruptcy-court-adopts-new-local-rule-for-section-363-sales/> (last visited Nov. 4, 2012); See also Bob Eisenbach, *Have Section 363 Sale Orders Gone too Far?*, IN THE (RED): THE BUSINESS BANKRUPTCY BLOG, <http://bankruptcy.cooley.com/2007/08/articles/business-bankruptcy-issues/have-section-363-sale-orders-gone-too-far/> (last visited Nov. 4, 2012) (comparing sale motions in major districts).

<sup>258</sup> *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 149–50 (3d Cir. 1986).

<sup>259</sup> Keach, *supra* note 47, at 60.

truly an arm's length transaction,<sup>260</sup> courts will generally make a finding of good faith unless there is "strong contrary evidence that the stalking horse lender has sought and obtained an unfair advantage over other bidders through the [creditor] or a manipulation of the approval process."<sup>261</sup> Since courts often authorize sales very soon after other creditors receive notice, it is unrealistic to assume an outsider would be able to find evidence of an insiders' manipulation.<sup>262</sup>

In theory, the burden of proving good faith falls upon its proponent;<sup>263</sup> in practice, the party challenging good faith would need to controvert the evidence of good faith since the challenging party would unlikely have the knowledge or information to provide direct evidence of bad faith.<sup>264</sup> In the short time frame before court authorization, it is unlikely a party would be able to make this showing. Many courts require a challenge to good faith be raised initially in the bankruptcy court or else the issue will also be moot on appeal.<sup>265</sup> Recognizing this difficulty, the Ninth Circuit permits remand for the sole purpose of determining good faith.<sup>266</sup>

If a creditor unearths new information after a sale is complete, the creditor may have a remedy under Federal Rule of Civil Procedure 60(b), which allows relief from a final judgment.<sup>267</sup> This rule can also be an avenue for review for a

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<sup>260</sup> An arm's length transaction is "[a] transaction between two unrelated and unaffiliated parties" or a "transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises." BLACK'S LAW DICTIONARY 1635 (9th ed. 2009).

<sup>261</sup> Keach, *supra* note 47, at 60.

<sup>262</sup> See LoPucki & Doherty, *supra* note 11, at 35 (stating it is naïve to expect a movant to bring forth evidence of a conflict of interest).

<sup>263</sup> T.C. Investors v. Joseph (*In re M Capital Corp.*), 290 B.R. 743, 745 (B.A.P. 9th Cir. 2003).

<sup>264</sup> See e.g., *In re Tempo Tech. Corp.*, 202 B.R. 363, 369–70 (D. Del. 1996) (dismissing the challenge to good faith because there was no evidence or contravention of the only evidence of good faith: testimony of the debtor's president); Roe & Skeel, *supra* note 29, at 745–46 (stating it is naïve to expect a movant to bring forth evidence of a conflict of interest).

<sup>265</sup> Schum v. Zwirn Special Opportunities Fund LP (*In re Watch Ltd.*), 295 F. App'x 647, 650 (5th Cir. 2008); Parker v. Goodman (*In re Parker*), 499 F.3d 616, 620 (6th Cir. 2007); Hazelbaker v. Hope Gas, Inc. (*In re Rare Earth Minerals*), 445 F.3d 359, 365 (4th Cir. 2006); Nieters v. Sevcik (*In re Rodriguez*), 258 F.3d 757, 759 (8th Cir. 2001); *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150–51 (3d Cir. 1986).

<sup>266</sup> See e.g., Cmty. Thrift & Loan v. Suchy (*In re Suchy*), 786 F.2d 900, 902 (9th Cir. 1985) (finding that good faith and whether § 363 applies is the trial court's domain); *M Capital Corp.*, 290 B.R. at 748 (holding that there must be evidentiary findings of good faith beyond just boilerplate); Thomas v. Namba (*In re Thomas*), 278 B.R. 782, 785 (B.A.P. 9th Cir. 2002). *Contra Watch Ltd.*, 257 Fed. App'x at 750 (citing Ginther v. Ginther Trusts (*In re Ginther Trusts*), 238 F.3d 686, 688–89 (5th Cir. 2001) (declining to examine facts not presented in the bankruptcy court)).

<sup>267</sup> FED. R. CIV. P. 60(b)(2)–(3); see also Baldwin v. Credit Based Asset Servicing and Securitization, 516 F.3d 734, 737–38 (8th Cir. 2008) (allowing the movant reasonable time to move for relief); Nanak Resorts,

party who received defective notice.<sup>268</sup> Rule 9024 incorporates Federal Rule of Civil Procedure 60(b) into bankruptcy proceedings.<sup>269</sup> Relief under this rule is extraordinary and rarely granted.<sup>270</sup> But even here, some courts hold that the rule cannot trump § 363(m) and no relief is possible where the Code forecloses it.<sup>271</sup> Regardless of what view courts take, the dueling policies of protecting creditor rights and the good faith purchaser collide. Even if the 60(b) motion is successful, there may be no relief available but to take to the property away from the good faith purchaser.<sup>272</sup>

#### 4. *Creditor Protections and Due Process*

Due process ensures that creditors' interests are not compromised. Ensuring these minimal protections need not be unreasonably prohibitive to the goals of reorganization. Courts can evaluate whether failings in procedure actually deprive creditors of rights or are mere technicalities. Unfortunately, this evaluation can pit a creditor's small private interest against the public's interest in reorganization. Nonetheless, even the smallest interests merit the fundamental protections of notice, an opportunity to be heard, and a chance to remedy a deprivation.

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Inc. v. Haskins Gas Serv., Inc. (*In re Rome Family Corp.*), No. 02-11771, 2010 WL 1381093, at \*2 (Bankr. D. Vt. Mar. 31, 2010) (holding that egregious failure of key parties to fulfill statutory duties merited an extraordinary remedy); *In re Aztec Supply Corp.*, 399 B.R. 480, 490 (Bankr. N.D. Ill. 2009) (same).

<sup>268</sup> FED. R. CIV. P. 60(b)(4) (allows relief for when a judgment is void such as when a court lacks subject matter of jurisdiction). Reversal under this rule requires a "plain usurpation of power." *Hunter v. Underwood*, 362 F.3d 468, 475 (8th Cir. 2004) (citation omitted).

<sup>269</sup> FED. R. BANKR. P. 9024; *see also* S. Motor Co. v. Carter-Pritchett-Hodges, Inc. (*In re MMH Auto. Grp.*, LLC), 385 B.R. 347, 359 (Bankr. S.D. Fla. 2008) (outlining three approaches that courts take in response to defective notice).

<sup>270</sup> *Nanak Resorts, Inc. v. Haskins Gas Serv. (In re Rome Family Corp.)*, 407 B.R. 65, 80–81 (Bankr. D. Vt. 2009).

<sup>271</sup> *E.g.*, *Contrarian Funds LLC v. Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F.3d 231, 250 (2d Cir. 2010) (holding § 363(m) strips the court of jurisdiction altogether and it must protect the entire order from review, not just a part); *In re Rickel & Assocs., Inc.*, 260 B.R. 673, 678 (Bankr. S.D.N.Y. 2001) ("[T]he Rules cannot provide a remedy that the Bankruptcy Code has substantively foreclosed." (quoting *Branchburg Plaza Assocs., L.P. v. Fesq (In re Fesq)* 153 F.3d 113, 116 (3d Cir. 1998))); *see also* Patrick M. Birneya, *Bankruptcy Rule 9024: Paper Tiger or Powerful Procedural Tool When Stacked Against the Bankruptcy Code*, 18 J. BANKR. L. & PRAC., Art. 4, available at Westlaw 18 J. Bankr. L. & Prac. 3 Art. 4 (arguing that the provisions of the Code should always trump the Rules).

<sup>272</sup> *See MMH Auto. Grp.*, 385 B.R. at 360–61.

a. *Notice*

To satisfy the due process clause, notice must inform the individual of the impending hearing and provide time to prepare for it.<sup>273</sup> Consistent with the flexibility throughout the Code, Rule 2002 provides for shortened notice, if circumstances merit it.<sup>274</sup> Manufacturing an emergency situation, through a lack of due diligence or failure to plan ahead, is not itself justification for abridging the notice requirement.<sup>275</sup> In *Chrysler*, the court held that publication in national newspapers was adequate notice, particularly since the case had been given so much public attention.<sup>276</sup> In *In re Haven Eldercare*, the court shortened notice periods because the conditions met the “financial extremis” test—the value of assets was deteriorating the debtors were unable to find a cash purchaser at auction, and there was no credible evidence that additional notice would enhance the interests of any constituency.<sup>277</sup>

Though all courts acknowledge that defective notice *can* invalidate a sale, they disagree on whether defective notice bars the operation of § 363(m).<sup>278</sup> Because the text of § 363(b) allows sales only “after notice and a hearing,”<sup>279</sup> some courts hold that inadequate notice invalidates a sale.<sup>280</sup> These courts hold that an appellant may appeal even absent a stay pending appeal.<sup>281</sup> Other courts

<sup>273</sup> *Owens-Corning Fiberglas Corp. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.)*, 759 F.2d 1440 (9th Cir. 1985) (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978)).

<sup>274</sup> FED. R. BANKR. P. 2002(a)(2).

<sup>275</sup> *In re Fort Wayne Assoc., L.P.*, No. 97-10378, 1998 WL 928419, at \*1 (Bankr. N.D. Ind. Dec. 16, 1998); *see also In re Amagansett Family Farm, Inc.*, No. 11-73929-AST, 2011 WL 5079493, at \*5 (Bankr. E.D.N.Y. Oct. 25, 2011); *In re Fields*, No. 05-71190, 2007 WL 1549760, at \*1 (Bankr. C.D. Ill. May 29, 2007); *In re Villareal*, 160 B.R. 786, 787–88 (Bankr. W.D. Tex. 1993); *In re Grant Broad. of Phila., Inc.*, 71 B.R. 390, 397 (Bankr. E.D. Pa. 1987) (holding accommodating a witness is not sufficient reason to push up notice).

<sup>276</sup> *In re Chrysler LLC*, 405 B.R. 84, 109 (Bankr. S.D.N.Y. 2009), *aff’d sub nom. Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 111 (2d Cir. 2009), *aff’d* 556 U.S. 960, 960 (2009), *vacated*, 130 S. Ct. 1015 (2009), *remanded*, 592 F.3d 370 (2d Cir. 2010).

<sup>277</sup> *In re Haven Eldercare, LLC*, 390 B.R. 762, 769, 770 (Bankr. D. Conn. 2008). *But see In re Sandra Cotton, Inc.*, 65 B.R. 153, 156 (W.D.N.Y. 1986) (holding the bankruptcy judge overstepped judicial discretion because the circumstances did not meet “financial extremis”).

<sup>278</sup> Howard J. Steinberg & Sean T. Torres, *Consequences of Improper Notice*, 1 BANKRUPTCY LITIGATION § 3.47 (2011).

<sup>279</sup> 11 U.S.C. § 363(b)(1) (2006) reads: “The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . .”

<sup>280</sup> *See e.g., In re Cavalieri*, 142 B.R. 710, 720 (Bankr. E.D. Pa. 1992) (nulling the sale because lack of adequate notice violated 363(b) and Rule 2002(a)(2)).

<sup>281</sup> *In re Longoria*, 400 B.R. 543, 552 (Bankr. W.D. Tex. 2009); *see, e.g., Citicorp Mortg. v. Brooks (In re Ex-Cel Concrete Co.)*, 178 B.R. 198, 205 (B.A.P. 9th Cir. 1995); *IRS v. Moberg Trucking, Inc. (In re Moberg Trucking, Inc.)*, 112 B.R. 362, 363–64 (B.A.P. 9th Cir. 1990); *see also Beneficial Cal., Inc. v. In re Villar (In re Villar)*, 317 B.R. 88, 94 (B.A.P. 9th Cir. 2004) (explaining that “the litigant attempting to effect service is

hold that although defective notice is cause to set aside a sale on appeal, it alone does not void a sale.<sup>282</sup> These courts reason that the goals of finality and protecting good faith buyers should operate as under other circumstances.<sup>283</sup> Before voiding a sale, these courts assess the harm to the inadequately notified party against the finality interests of a good faith purchaser.<sup>284</sup> These courts decline to void a sale if the objecting party had actual notice, but not formal notice, of the hearing.<sup>285</sup>

For instance, in *In re CLC Corp.*, an objecting party's failure to inform the bankruptcy court of a transfer of interest, which resulted in the lack of formal compliance with notice requirements, was a technicality that should not invalidate the whole sale.<sup>286</sup> In *In re Edwards*, the Seventh Circuit Court of Appeals dismissed an appeal as moot although the creditor never received formal notice before the sale because the objecting creditor neglected to take action for three and half months after receiving actual notice and eighteen months after the sale's approval.<sup>287</sup> The court reasoned that denial of due process, like any legal error, is waived if not timely raised.<sup>288</sup> In *In re Ex-Cel Concrete Co.*, the Ninth Circuit rejected the *Edwards* balancing approach in favor of stricter protection for due process rights.<sup>289</sup> In this instance, the Ninth Circuit Bankruptcy Appellate Court found that no notice was a jurisdictional defect and voided the sale.<sup>290</sup>

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responsible for proper service and bears the burden of proof"); *Doolittle v. Santa Cruz (In re Metzger)*, 346 B.R. 806, 816, 815 (Bankr. N.D. Cal. 2006).

<sup>282</sup> *Gekas v. Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012, 1018 (7th Cir. 1988); *Knupfer v. HSA Residential Mortg. Servs., Inc. (In re Lau Capital Funding, Inc.)*, 321 B.R. at 295 (Bankr. C.D. Cal. 2005); *Newman Grill Sys., LLC v. Ducane Gas Grills, Inc. (In re Ducane Gas Grills, Inc.)*, 320 B.R. 324, 332–33 (Bankr. D.S.C. 2004).

<sup>283</sup> *Met-L-Wood Corp.*, 861 F.2d at 1018 (noting that § 363(m) does not apply because all parties in the case were guilty of fraud); *Lau Capital Funding*, 321 B.R. 287, 295 (Bankr. C.D. Cal. 2005) (holding that though defective notice may cause the sale to be voidable, it does not itself void contract entirely); *In re Ducane Gas Grills, Inc.*, 320 B.R. at 332–33.

<sup>284</sup> See *In re F.A. Potts & Co., Inc.*, 86 B.R. 853, 861 (Bankr. E.D. Pa. 1988) ("The notice requirement is the fulcrum we use to balance a debtor's title 11 protections against the Fifth Amendment guarantee that creditors will not be deprived of 'life, liberty or property' without 'due process of the law.'"), *aff'd sub nom. Appeal of Pagnotti Enterprises, Inc.*, 891 F.2d 282 (3d Cir. 1989).

<sup>285</sup> LAWRENCE R. AHERN III & NANCY FRAAS MACLEAN, BANKR. PROC. MANUAL § 6004:1 (2011) (citing *Wood v. CLC Corp. (In re CLC Corp.)*, 110 B.R. 335, 339 (Bankr. M.D. Tenn. 1990)); see also *S. Motor Co. v. Carter-Pritchett-Hodges, Inc. (In re MMH Auto Grp., LLC)*, 385 B.R. 347, 357–58 (Bankr. S.D. Fla. 2008).

<sup>286</sup> Cf. *CLC Corp.*, 110 B.R. at 340.

<sup>287</sup> *In re Edwards*, 962 F.2d 641, 645 (7th Cir. 1991).

<sup>288</sup> *Id.* at 644.

<sup>289</sup> *Citicorp Mortg. v. Brooks (In re Ex-Cel Concrete Co.)*, 178 B.R. 198, 204–05 (B.A.P. 9th Cir. 1995).

<sup>290</sup> *Id.* at 205.

However, even the courts that take a harder line on voiding sales recognize that if relief can be granted without rescinding a sale, the court should do so. In *In re Center Wholesale*, the court acknowledged that the one-day's notice the creditor received was inadequate, so it sought a compromise that would protect the creditor's rights without reversing the sale to the good faith buyer.<sup>291</sup> The court remanded the case to the bankruptcy court and suggested the inadequately notified party be placed in the position it occupied before the sale.<sup>292</sup>

### 5. *Manufacturing an Emergency*

Deference to a debtor in assessing the need for urgent action leaves the court vulnerable to a contrived emergency to appease an impatient buyer or circumvent procedural norms. The Code recognizes that more fair and efficient outcomes result from a rigid procedure that allows for timely deliberation and distributions, rather than a race among creditors for the debtor's property. Rule 6003 aimed to prevent certain creditors from getting an advantage by rushing to court for the best treatment.<sup>293</sup> While a quick resolution may have a better outcome for an individual creditor, expediting these deliberations should not come at the expense of other creditors' rights.<sup>294</sup>

#### a. *First-Day Orders*

First-day orders, or those entered the first day after filing a petition,<sup>295</sup> are problematic because of their ability to circumvent the reorganization process before assessing whether appointment of creditor committees is appropriate.<sup>296</sup> Recognizing the disruption to the orderly procedure of bankruptcy that comes from a rush to the courthouse for first-day orders, the Rules Committee added Rule 6003 in 2008.<sup>297</sup> Rule 6003 prohibits relief within the first twenty-one

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<sup>291</sup> *Owens-Corning Fiberglass, Inc. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.)*, 759 F.2d 1440, 1149–50 (9th Cir. 1985).

<sup>292</sup> *Id.* at 1451 (suggesting that this could be achieved by granting Owens-Corning super-priority under § 507(b)).

<sup>293</sup> See *infra* Part II.D.5.a.

<sup>294</sup> See Bussel & Klee, *supra* note 37, at 738.

<sup>295</sup> See generally Steven N. Cousins, et al., *First Day Orders: An Examination*, 11 J. BANKR. L. & PRAC. 213, 213 (2002).

<sup>296</sup> ADVISORY COMM. ON BANKR. RULES, MEETING OF OCTOBER 2–3, 2008 147–48 (2008), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Bankruptcy/BK2008-10.pdf>.

<sup>297</sup> See FED. R. BANKR. P. 6003 advisory committee notes.

days of petition unless there would be irreparable harm without action.<sup>298</sup> In essence, Rule 6003 acts as a speed bump, providing more time to all parties and the court to consider to fundamental matters of the case.<sup>299</sup>

If “irreparable harm” would result absent immediate action, Rule 6003 has an exception to the mandatory waiting period,<sup>300</sup> but since debtors use § 363 sales for their speed, evidence that denying a sale would have any negative effect on the debtor could suffice for a showing of irreparable harm. Like the valid business purpose test, the irreparable harm standard forces the court to defer to the debtor’s management on the urgent necessity of the sale.<sup>301</sup> Thus, the debtor’s portrayal of the situation colors both a court’s authorization of the sale and its willingness to expedite creditors’ rights to avoid irreparable harm. But, it is extremely rare for a business scenario to truly necessitate a sale within twenty-one days.<sup>302</sup> Irreparable harm requires a showing that the movant will suffer “actual and imminent” harm, not just “speculative or unsubstantiated” harm.<sup>303</sup> A narrower interpretation of “irreparable harm,” which imports an analysis similar to the doctrine of necessity, would limit its application to rare and exceptional circumstances with veritable imminent harm.<sup>304</sup>

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<sup>298</sup> *Id.* 6003. Prior to the enactment of Rule 6003, it was not uncommon for a large volume of documents filed in the first days of a case. ADVISORY COMM. ON BANKR. RULES, *supra* note 296.

<sup>299</sup> See FED. R. BANKR. P. 6003 advisory committee notes (2007 Adoption). Part of the impetus for time to consider was to reduce the instance of forum shopping for courts more willing to grant relief immediately. Memorandum from Bankruptcy Judges Advisory Group on Rule 6003, to Bankruptcy Rules Advisory Committee (Aug. 24, 2008), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Suggestions%202008/08-BK-D-Suggestion-Bankruptcy%20Rules%20Advisory%20Committee.pdf>.

<sup>300</sup> FED. R. BANKR. P. 6003.

<sup>301</sup> When applying the irreparable harm standard to critical vendor payments, courts generally approve them so long as the debtor can show that a vendor has threatened to cut off post-petition goods or services if not paid; the vendor cannot be easily replaced; and that such a creditor requires payment for prepetition services before postpetition performance will be granted. *In re Kmart Corp.*, 359 F.3d 866, 872–73 (7th Cir. 2004).

<sup>302</sup> 10 COLLIER, *supra* note 10, ¶ 6003.0102[3][b]. *But see* Bay Harbour Mgmt., L.C. v. Lehman Bros. Holdings, Inc. (*In re* Lehman Bros. Holdings, Inc.), 415 B.R. 77, 80–81 (S.D.N.Y. 2009) (finding an extraordinary emergency); *In re Bombay Co.*, No. 07-44084-RFN-11, 2007 WL 2826071, at \*3–4 (Bankr. N.D. Tex. Sept. 26, 2007) (same).

<sup>303</sup> *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006) (citations omitted) (internal quotation marks omitted).

<sup>304</sup> Andy Vara, *The Impact of BAPCA and Rule Changes in Chapter 11 Cases*, in 16TH ANNUAL CENTRAL STATES BANKRUPTCY WORKSHOP, TRAVERSE CITY, MI. JUNE 11–14, 2009, available at Westlaw, 061109 ABI-CLE 359; Matthew T. Gensburg, et al., *Business Practitioners: Life under BAPCPA—The Impact of BAPCPA and Rule Changes in Chapter 11 Cases*, in 16TH ANNUAL CENTRAL STATES BANKRUPTCY WORKSHOP, *supra* at \*2.



The doctrine of necessity is an equitable doctrine that allows immediate relief—the minimum necessary to maintain the debtor’s existence.<sup>305</sup> Prior to the enactment of Rule 6003, it governed consideration of first-day orders by limiting such orders to those that would not violate or disregard anyone’s substantive rights in ways not authorized by the Code.<sup>306</sup> The doctrine of necessity balances two prongs: the reorganization of viable entities and the equal treatment of all creditors.<sup>307</sup> Some remedies that allow for payment of prepetition creditors defy equal treatment, but may be indispensable to reorganization, such as a critical vendor.<sup>308</sup>

*b. Demonstrating Irreparable Harm*

The irreparable harm standard can be abused as a tool of appeasement of creditors or potential buyers.<sup>309</sup> When a debtor delays filing bankruptcy despite knowledge of the pending situation to compel an urgent sale, it deprives creditors of the opportunity to receive adequate notice.<sup>310</sup> In *In re Adamson*, the court found that the debtor’s delay to file its bankruptcy petition despite prior knowledge of the need for long-term financing was bad faith.<sup>311</sup> The *Adamson* court analogized the request for emergency relief to the request for a temporary restraining order under the Federal Rules of Civil Procedure.<sup>312</sup> The court said notice requirements for first-day orders, which grant a going-forward change, should be at least as burdensome for fundamental bankruptcy matters as it is for temporary restraining orders, which preserve the status quo.<sup>313</sup> The debtor should not be able to circumvent this burden by delaying to file a petition.<sup>314</sup>

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<sup>305</sup> 10 COLLIER, *supra* note 10, ¶ 6003.01[1][b]; see also *Kmart Corp.*, 359 F.3d at 871 (“A doctrine of necessity’ is just a fancy name for a power to depart from the Code.”).

<sup>306</sup> 10 COLLIER, *supra* note 10, ¶ 6003.01[1][b] n.20 (citing *In re Colad Grp., Inc.*, 324 B.R. 208, 213–14 (Bankr. W.D.N.Y. 2005)).

<sup>307</sup> *In re United Am., Inc.*, 327 B.R. 776, 781 (Bankr. E.D. Va. 2005).

<sup>308</sup> *Id.* at 781–82 (explaining that for a vendor to receive critical vendor status, the payment must be in the best interest of the debtors and other creditors; the transaction must be in sound business judgment; and not prejudice other creditors).

<sup>309</sup> *Id.* at 782.

<sup>310</sup> *In re Adamson Co., Inc.*, 29 B.R. 937, 941 (Bankr. E.D. Va. 1983).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 940–41. Rule 65(b) allows a temporary restraining order without written or oral notice only if immediate and irreparable injury, loss or damage will occur before notice can be served and the movant’s attorney certifies in writing the efforts, if any, which have been made to provide parties in interest adequate notice.

<sup>313</sup> *Id.* at 941.

<sup>314</sup> *Id.*

The problem with the melting ice cube justification is that the debtor can easily unplug the freezer.<sup>315</sup> In *In re Humboldt Creamery LLC*, the court reluctantly approved a sale, but explained that the modern trend of debtors waiting until there is no ability to survive in chapter 11 strips the bankruptcy judge of meaningful discretion, since the judge must decide between rubber stamping a sale or rejecting the sale and allowing the debtor to fail.<sup>316</sup> The court explained that only a judge with exceptional courage would reject such a sale.<sup>317</sup> If a court believes the DIP contrived the emergency, it could refuse to make a finding of good faith, thereby preventing the rushed sale from being protected by mootness.<sup>318</sup> However, rescinding mootness would still cause the same problem as disapproving a sale outright: the threat of compromising the reorganization or discouraging future buyers.<sup>319</sup>

### III. BALANCING INTERESTS: DUE PROCESS & FINALITY

#### A. *Flexible Due Process*

Bankruptcy courts reasonably apply procedural due process as a flexible concept to protect rights without undermining the equitable goals of the court.<sup>320</sup> Procedural due process requires a reasonable opportunity to be heard and notice that is reasonably calculated.<sup>321</sup> Section 102(1) encapsulates the fundamental notions of procedural due process in bankruptcy proceedings.<sup>322</sup> In *Mathews v. Eldridge*, the Supreme Court presented a utilitarian calculus for considering how far the flexibility of due process can extend.<sup>323</sup> This calculus includes three factors: private interests, the risk of an erroneous deprivation,

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<sup>315</sup> *In re Humboldt Creamery, LLC*, No. 09-11078, 2009 WL 2820610, at \*2 (Bankr. N.D. Cal. Aug. 14, 2009).

<sup>316</sup> *Id.* (“While nominally ‘presiding’ over the case, the judge is reduced to a figurehead without any meaningful discretion and might as well leave his or her signature stamp with the debtor’s counsel and go on vacation or shift attention to consumer cases where the law may still mean something.”).

<sup>317</sup> *Id.*

<sup>318</sup> *In re Bombay Co.*, No. 07-44084-RFN-11, 2007 WL 2826071, at \*3 (Bankr. N.D. Tex. Sept. 26, 2007).

<sup>319</sup> *Id.* at \*3–4 (declining to assign responsibility for the contrived time trap, despite noting evidence of the time trap); *In re Tempo Tech. Corp.*, 202 B.R. 363, 367–70 (D. Del. 1996) (rejecting allegations that debtor waited to complete negotiations with the buyer before filing bankruptcy).

<sup>320</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”).

<sup>321</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>322</sup> *See Owens-Corning Fiberglass, Inc., v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.)*, 759 F.2d 1440, 1449 (9th Cir. 1985).

<sup>323</sup> *See CHEMERINSKY, supra* note 88, at 583 (discussing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

and the government's interest.<sup>324</sup> For § 363 sales, the private interests are the property rights of creditors. Property considerations are tempered by the incremental increase in creditors' rights from the creation of more procedural hurdles to § 363 sales. These private interests are weighed against the government's interest in the program.<sup>325</sup> Procedural due process is commonly litigated within the context of administration of government programs, but here, the government's function is less direct: facilitating the reorganization of distressed companies through the Code.

Few bankruptcy courts explicitly import the *Mathews* utilitarian calculus, but the case shaped the jurisprudence of procedural due process.<sup>326</sup> The Northern District of Texas Court explicitly applied the analysis in *In re Texas Extrusion Corp.*<sup>327</sup> The court defined the private interest as the appellant's equity interest in the bankruptcy estate, or her husband's property.<sup>328</sup> The court reasoned that since the estate was community property, the appellant received constructive notice through her husband and additional notice to her directly would not have mitigated the chance or erroneous deprivation.<sup>329</sup> Because the interest in finality outweighed the minimal benefits of a finding of inadequate notice, the court held that there was no violation of the appellants' due process rights.<sup>330</sup> Thus, the court held the equitable interests of third parties outweighed the appellant's harm from a technicality, not truly inadequate notice.<sup>331</sup> In *Mullane v. Central Hanover Bank & Trust*, the Supreme Court endorsed such a practical view of due process, declaring personal service of written notice to unknown parties would be an unjustified obstacle.<sup>332</sup> Consideration of the rights of all parties need not lead to unreasonable results.<sup>333</sup>

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<sup>324</sup> *Mathews*, 424 U.S. at 335.

<sup>325</sup> *Id.*

<sup>326</sup> The case is commonly cited by courts for its holding that the "opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 333; see also CHEMERINSKY, *supra* note 88, at 335.

<sup>327</sup> *Tex. Extrusion Corp. v. Palmer, Palmer & Coffee (In re Tex. Extrusion Corp.)*, 68 B.R. 712, 726 (N.D. Tex. 1986), *aff'd*, 836 F.2d 217 (5th Cir. 1988), *aff'd sub nom. Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142 (5th Cir. 1988).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 727.

<sup>331</sup> *Id.* at 726.

<sup>332</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–14 (1950).

<sup>333</sup> *GMAC Mortg. Corp. v. Salisbury (In re Loloee)*, 241 B.R. 655, 661–62 (B.A.P. 9th Cir. 1999) (explaining that court must evaluate the difference between the notice that was given and what should have been given if the Rules were followed to determine whether it flunks "due process").

The expedited process of § 363 sales coupled with the mootness protection offers sophisticated debtors and buyers a mechanism to circumvent the rights of other parties-in-interest.<sup>334</sup> Congress recognized the tendency of debtors to pacify large creditors, who hold leverage in the future reorganized debtor, at the expense of small and scattered parties-in-interest.<sup>335</sup> Unlike other areas of law,<sup>336</sup> bankruptcy precludes post-deprivation relief because of the inability to undo a transaction.<sup>337</sup> Thus, few remedies can be preserved that would not disrupt the reorganization goals of the bankruptcy courts. Even if sale authorization hearings occur, their pace can prevent creditors from putting forth a meaningful objection.<sup>338</sup> Courts are generally deferential to debtors because of the aim to facilitate successful reorganizations,<sup>339</sup> but the need for a speedy reorganization should not outweigh assurance that due process rights are preserved.<sup>340</sup>

In the *Borders* bankruptcy, the court recognized the importance of due process rights even for small transactions.<sup>341</sup> The judge *sua sponte* modified the sale procedures because they violated creditors' due process rights.<sup>342</sup> The debtor requested the court order a forward-looking finding of good faith, but the court refused and instead required affirmative evidence of good faith for any particular sale.<sup>343</sup> The court also rejected the proposal that there would be no notice on sales of assets worth under \$300,000 and only five-days' notice for sales under \$1 million.<sup>344</sup>

In some instances, creditors are sophisticated enough to formulate their own objections to protect their due process rights. In other instances, the court

<sup>334</sup> See LoPUCKI, *supra* note 30, at 167–69 (arguing that some approved sales are doubtfully even legal).

<sup>335</sup> S. REP. No. 95-989, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5796.

<sup>336</sup> *E.g.*, Goldberg v. Kelly, 397 U.S. 254, 260–66 (1970) (discussing the possibility of post-deprivation relief in the cessation of welfare benefits and contrasting with other interests).

<sup>337</sup> Lindsey Freeman, Comment, *BAPCPA and Bankruptcy Direct Appeals: The Impact of Procedural Uncertainty of Predictable Precedent*, 159 U. PA. L. REV. 543, 571 (2011).

<sup>338</sup> See LoPucki & Doherty, *supra* note 11, at 40.

<sup>339</sup> *In re GSC, Inc.*, 453 B.R. 132, 174 (Bankr. S.D.N.Y. 2011) (“Courts give deference to the debtor as long as there is a ‘reasonable basis for its business decision.’”); see also LoPucki & Doherty, *supra* note 11, at 40 (stating that as of the time of publication, there was no modern case where a large public company proposed a sale and the courts refused to approve it).

<sup>340</sup> *Citicorp Mortg., Inc. v. Brooks (In re Ex-Cel Concrete Co.)*, 178 B.R. 198, 205 (B.A.P. 9th Cir. 1995) (stating that the exigency and equitable aims of the bankruptcy code do not justify departures from due process).

<sup>341</sup> *In re Borders Grp., Inc.*, 453 B.R. 477, 483–84 (Bankr. S.D.N.Y. 2011).

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 484–85.

<sup>344</sup> *Id.* at 483.

will raise notice issues on its own recognizing unfair treatment of small creditors, as the *Borders* court did. The debtor's proposal in *Borders* would have eliminated any meaningful opportunity to object.<sup>345</sup> Notice and opportunity to be heard is a hallmark of due process rights, but given that § 363(m) bars any appeal after sale authorization, a creditor stripped of notice and an opportunity to be heard effectively has no rights or remedies whatsoever.

### *B. Recommendations*

Because of the desire to protect good faith purchasers, getting an appeal is very challenging. Recognizing this, courts should endeavor to avoid appealable issues arising. Courts should adopt an approach to § 363 sales that balances the interests of protecting creditor rights without sacrificing the most attractive aspects of bankruptcy—flexibility and finality.<sup>346</sup> As discussed, such balancing need not sacrifice effective reorganizations for technicalities.<sup>347</sup> Rather, it would weigh the incremental benefits to the creditor from the added protection against the detriment to the reorganization. This approach should recognize that a slightly less than optimal solution for the debtor could be justified by the benefits of ensuring procedural safeguards. After sale authorization, stays pending appeal should not be virtually unattainable remedies. If they are not obtained though, courts should adopt the more equitable approach of recognizing an exception to § 363(m), which grants relief when it is possible without undermining finality before mooting an appeal.

#### *1. Protecting from Powerful Creditors*

A debtor who files for bankruptcy is desperate to reorganize as quickly and efficiently as possible. When a buyer steps in willing to finance a reorganization through the purchase of assets, that buyer has the debtor at its mercy.<sup>348</sup> Buyers always have an incentive to get a sale done as quickly as possible, particularly when that sale bears no risk of future litigation.<sup>349</sup> The fact that a buyer wants a quick sale does not mean the debtor and the court

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<sup>345</sup> *Cf. id.* at 484. (rejecting the movants' assertion that good faith be presumed).

<sup>346</sup> *See supra* Part I.A.3.

<sup>347</sup> *See supra* text accompanying notes 329–33.

<sup>348</sup> *See* Frost, *supra* note 65, at 128–29; Charles Jordan Tabb, *Emergency Preferential Orders in Bankruptcy Reorganizations*, 65 AM. BANKR. L.J. 75, 79 (1991).

<sup>349</sup> *See supra* Part II.A.2.

must comply;<sup>350</sup> the court's role should be to protect the desperate debtor from agreeing to conditions compelled out of duress, particularly when those conditions sacrifice the rights of other creditors.<sup>351</sup>

The court, like the debtor, is captive to the parties in interest, particularly since management involved with the daily operations of the business can best assess the urgent status of a proposed sale.<sup>352</sup> Courts import the business judgment rule to give the debtors great deference and are reluctant to scrutinize the proposed sales absent objections.<sup>353</sup> A willing buyer may offer too attractive an opportunity to give up because of a few offending points.<sup>354</sup> The bankruptcy court's dilemma is whether to grant the order despite possible problems or risk a failed reorganization; the short time to make the decision exacerbates the problem.<sup>355</sup>

If courts import the business judgment rule from corporate law, they should also import the increased skepticism of sales involving self-interested transactions. When a sale is conducted, courts should seek proof that the debtor carefully considered all its options, that an approved buyer is the highest bidder, and that the auction procedures allowed fair solicitation of *all* bids. Under Delaware corporate law, when a company is up for sale, courts apply the *Revlon* doctrine, which shifts management's fiduciary duties from the corporation to obtaining the highest bid for shareholders.<sup>356</sup> The doctrine ensures a true market test that leaves no doubt as to the value of the company.<sup>357</sup> Because one of the primary justifications for market sales is their ability to provide a more accurate valuation than the court could give on its

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<sup>350</sup> Adler, *supra* note 29, at 308.

<sup>351</sup> *In re Cloverleaf Enters., Inc.*, No. 09-20056, 2010 WL 1445487, at \*2-3 (Bankr. D. Md. Apr. 2, 2010).

<sup>352</sup> Miller & Waisman, *supra* note 46, at 154-55.

<sup>353</sup> J. Seth Moore & Vincent P. Slusher, *Bankruptcy Code Section 363 Sales: Trends and Opportunities*, 2007 NORTON BANKR. L. ADVISER 2, Sept. 2007, at \*6, 8, available at Westlaw, 2007 No. 9 Norton Bankr. L. Adviser 2 (citing *Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981)).

<sup>354</sup> Roe & Skeel, *supra* note 29, at 736.

<sup>355</sup> See generally Tabb, *supra* note 29 (discussing this overarching dilemma when considering emergency orders).

<sup>356</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986); *Paramount Comm. v. QVC Network*, 637 A.2d 34 (Del.1994); see also *In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000) (declining to address whether *Revlon* duties are imposed in bankruptcy to fully market assets because they would not be relevant in the situation); *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997) (confirming the consensus that fiduciary duties applicable in corporate law continue to operate in chapter 11 cases).

<sup>357</sup> Adler, *supra* note 29, at 316.

own,<sup>358</sup> expedited sales should have a similar standard. Creditors' interests, just like shareholders' interests, should not be auctioned off in a fire sale, but should be carefully marketed to ensure they receive the highest bid for their property. Courts can require that a § 363 motion include a disclosure of the kind of sales processes undertaken and the reason the choice was made.<sup>359</sup> As in corporate law,<sup>360</sup> bankruptcy does not require the debtor accept the highest bid, but the best bid, so long as there is a legitimate business reason that makes that bid better than the highest bid.<sup>361</sup> However, a legitimate business reason should be assessed in light of not just management's best interest, but also the creditors' best interest.<sup>362</sup>

When a sale involves a powerful creditor, the court should exercise heightened scrutiny of that creditor's influence upon the debtor and how proposed actions impact minority creditors. The significant deference afforded to debtors in such circumstances is not justified, particularly because a debtors' management does not have the same incentives as a solvent company.<sup>363</sup> In bankruptcy, management's fiduciary duties shift from the corporation to the creditors.<sup>364</sup> Under the Code, a party may qualify as an "insider," if it is functionally equivalent to one of the enumerated definitions in § 101(31)(B) and has the ability to coerce the debtor's actions.<sup>365</sup> Because a powerful

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<sup>358</sup> *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 424 (S.D. Tex. 2009) ("The principal justification for § 363(b) sales is that aggressive marketing in an active market assures that the estate will receive maximum benefit."). *But see* Robert E. Steinberg, *The Seven Deadly Sins in § 363 Sales*, AM. BANKR. INST. J., June 2005, at 22 ("[T]he § 363 sale process fails to maximize value because debtor management is not able to lead the process properly or does not recognize, due to inexperience with the process, the many pitfalls and obstacles . . .").

<sup>359</sup> *See e.g.*, *In re GSC, Inc.*, 453 B.R. 132, 169 (Bankr. S.D.N.Y. 2011); *In re Integrated Res., Inc.* 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992); *In re Fin. News Network, Inc.*, 126 B.R. 152, 157 (Bankr. S.D.N.Y. 1991).

<sup>360</sup> *Barkan v. Amsted Indus., Inc.*, 527 A.2d 1279 (Del. 1989) (holding that there is no set method of fulfilling *Revlon* duties).

<sup>361</sup> *See supra* Part I.A.3.

<sup>362</sup> *In re Cloverleaf Enters., Inc.*, No. 09-20056, 2010 WL 1445487, at \*2-3 (Bankr. D. Md. Apr. 2, 2010).

<sup>363</sup> *See discussion supra* Part II.B.

<sup>364</sup> The breadth of this shift of duties varies based on the state corporate law. *See generally* Laura Lin, *Shift of Fiduciary Duty upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors*, 46 VAND. L. REV. 1485, 1512 (1993); *see also* *Prod. Res. Grp., LLC v. NCT Grp., Inc.*, 863 A.2d 772, 789-90 (Del. Ch. 2004) (disagreeing with the contention that there is a shift of duties from shareholders to creditors, but reasoning instead that when companies are in the "zone of insolvency," duties persist both constituencies). Creditors do not have a direct claim for breach of fiduciary duty against directors. *Mukamal v. Bakes*, 378 F. App'x 890, 898 (11th Cir. 2010) (interpreting *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 94 (Del. 2007)).

<sup>365</sup> *Schubert v. Lucent Techs., Inc. (In re Winstar Commc'ns)*, 554 F.3d 382, 396-97 (3d Cir. 2009) (discussing the existence of non-statutory insiders who exert the equivalent control of statutory insiders).

creditor-buyer can coerce the debtor, such sales merit heightened scrutiny. A court should at least be satisfied that such a transaction is a bona fide arm's length transaction rather than a transaction driven by factors other than fiduciary duties.<sup>366</sup>

When a sale is to be completed quickly, rather than inferring from the lack of objections that the sale should go ahead, the court should make affirmative findings that the sale is fair to creditors. If a creditor's time to object is limited, a sale could be moot before a creditor even discovers the problem. To compensate for the condensed time in which creditors may not have an opportunity to formulate meaningful objections, a court should exercise its judgment to ensure that creditors are not being unfairly treated.<sup>367</sup>

The court should also require concrete evidence not just that a sale is necessary, but also that it must be done within the short time frame requested. Exigency alone is not sufficient to show why a sale must be done in a given short time frame. A second best alternative, which ensures creditor rights, may be preferable. For example, in *GSC*, the court held that even though the buyer would not walk away from the sale, the potential for a lower price was enough to justify accommodating the buyer's demands.<sup>368</sup> Here, the court capitulated to an unhappy buyer, despite acknowledging the reorganization could survive without doing so. Instead, courts should not circumvent creditor protections, but rely on the debtor and buyer to work out the creditor's objection without sacrificing the highest bid, since eliciting the highest price is in the interest of all parties.<sup>369</sup>

## 2. *Providing an Opportunity for Review*

Enforcing the fourteen-day stay provision of Rule 6004(h) will also prevent buyers from exerting pressure to get a deal done faster. A mandatory cushion removes the incentive for a buyer to push the debtor for an immediate sale,

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<sup>366</sup> *In re Tidal Const. Co., Inc.*, 446 B.R. 620, 624 (Bankr. S.D. Ga. 2009) (citing *In re Gen. Bearing Corp.*, 136 B.R. 361 (Bankr. S.D.N.Y. 1992)); see also *In re Borders Grp., Inc.*, 453 B.R. 477, 484–85 (Bankr. S.D.N.Y. 2011) (explaining a purchaser's lack of connections with the debtor is an indication of good faith).

<sup>367</sup> See e.g., *In re Naron & Wagner, Chartered*, 88 B.R. 85, 89 (Bankr. D. Md. 1988) (ordering a second round of notice statements, which minimally adequately notified creditors, in lieu of chapter 11 organization disclosure); see also *In re Bombay Co.*, No. 07-44084-RFN-11, 2007 WL 2826071, at \*4 (Bankr. N.D. Tex. Sept. 26, 2007) (noting that even though there were some objectors, the court was not satisfied that all potential objectors had the opportunity to voice their objections).

<sup>368</sup> *Supra* Part II.A.2.

<sup>369</sup> Courts in bankruptcy often defer to parties to work out conflicts, but in this situation courts may need to intervene to ensure there are not persistent hold out problems.



which would eliminate the possibility of appellate review.<sup>370</sup> A statutory waiting period would take it out of the debtor's hands as a negotiating point.

This stay coupled with the mandatory twenty-one days' notice will give a creditor more time to formulate an objection. Only in the exceptional case should notice be abbreviated to less than twenty-one days and to less than all creditors. The approval provisions for notice should ensure that all creditors are receiving not only adequate information, but also within a reasonably advanced period to prepare meaningful objections.

An explicit standard requiring a minimum showing that a fourteen-day stay is unduly burdensome for the debtor's reorganization would help guarantee more time for creditors to formulate objections. The mere desire of a purchaser to get a sale done quickly does not justify depriving a creditor of time to consider the ramifications of a sale and possible objections.

Once a sale order is approved, courts should be very willing to grant a stay pending appeal, unless the grounds for appeal are unfounded. Once a court denies a stay and a sale consummates, the potential appellant with a meritorious claim is irreparably harmed.<sup>371</sup> The irreparable harm standard should apply consistently for creditors and debtor movants: if courts accept the debtors speculative arguments of harm to the company by not completing a sale immediately, a creditor's concrete harm of not being able to undo a sale should receive equal weight, as the court in *Adelphia* recognized.<sup>372</sup> Consideration of a stay must consider this threat foremost rather than circularly focusing on whether the already court-authorized sale is immediately necessary for reorganization. If a bankruptcy court denies a stay pending appeal, a party may attempt an expedited appeal of the denial.<sup>373</sup> Making this form of review more readily available allows a different court to review whether the bankruptcy court's deference to the debtor was excessive and whether the creditor's objections merit review.

The speculative harm of the bidder paying a lower price after waiting for an appeal would be mitigated by the appellant's willingness to post a bond.

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<sup>370</sup> Kunej, *supra* note 107, at 271; see also Bruce H. White & William L. Medford, *Equitable Mootness and Substantial Consummation: Are You Losing Your Appeal?*, AM. BANKR. INST. J., Feb. 2001, at 26, 26–27.

<sup>371</sup> See *supra* Part I.C.

<sup>372</sup> See *supra* notes 120–22 and accompanying text.

<sup>373</sup> FED. R. BANKR. P. 8011. *Chrysler* was an example of stay denial that was emergency appealed to the court of appeals; see also *In re Boscov's, Inc.*, No. 08-11637 (KG), 2008 WL 4975882 (Bankr. D. Del. Nov. 21, 2008).

Payment of the bond indemnifies the party whose action the stay pending appeal halts, in the event the appealing party does not prevail.<sup>374</sup> This requirement limits the parties who would seek stays to those confident their appeal has merit and that they would not lose money on the appeal.<sup>375</sup>

### 3. *Equitably Interpreting Mootness*

Section 363(m) should not serve to moot all unstayed appeals. Courts, uncomfortable with such a harsh result, have carved out an array of narrow exceptions.<sup>376</sup> Ultimately, courts have incorporated the principles of equitable mootness to interpret the statutory mootness provision. The speed of the § 363 sales makes them more vulnerable to abuses and unfairness than a reorganization plan.<sup>377</sup> This should make the sales more, not less, prone to review and the consideration of whether fair remedies are available. At the least, the doctrine of equitable mootness should explicitly apply to both reorganization plans and the sales, which are increasingly replacing plans. While the application of the doctrine is not entirely predictable the way a *per se* rule is, it does operate effectively in reorganization plans to preserve finality without condoning potentially grave injustices to creditors.

A narrower interpretation of § 363(m) could decrease the use of § 363 sales, since statutory mootness is a benefit of § 363 sales. However, an expedited process creates myriad windows for abuse. If debtors have a real choice between using a process that limits the protections for creditors versus a reorganization plan, a preference for plans with full creditor protections is desirable.<sup>378</sup> The doctrine of necessity is not for routine use, but rather an alternative in an emergency.<sup>379</sup> The threat of contrived emergencies exists;

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<sup>374</sup> FED. R. BANKR. P. 8005.

<sup>375</sup> Kuney, *supra* note 107. FED. R. BANKR. P. 7062 incorporates FED. R. CIV. P. 62(d), which does not specify how to calculate a bond amount, but courts have read in the requirements of its predecessor, as some proportion of the judgment remaining unsatisfied. *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979).

<sup>376</sup> *Supra* Part II.C.2.

<sup>377</sup> *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 423–24 (Bankr. S.D. Tex. 2009).

<sup>378</sup> *E.g., In re Bombay Co.*, No. 07-44084-RFN-11, 2007 WL 2826071, at \*3 (Bankr. N.D. Tex. Sept. 26, 2007) (stating its preference for plans to § 363 sales). However, there is no clear evidence that decreasing the breadth of mootness will dissuade debtors from using this option. *See* Part II.C.2–3.

<sup>379</sup> *In re CoServ, LLC*, 273 B.R. 487, 491 (Bankr. N.D. Tex. 2002) (explaining doctrine of necessity is to be used only in rare cases); *Official Asbestos Claimants' Comm. v. Babcock & Wilcox Co.*, (*In re Babcock & Wilcox Co.*), 274 B.R. 230, 256 n.208 (Bankr. E.D. La. 2002) (same); *In re C.A.F. Bindery*, 199 B.R. 828, 835–36 (Bankr. S.D.N.Y. 1996) (mentioning doctrine receives limited application); Joseph Gilday, “Critical” Error: Why Essential Vendor Payments Violate the Bankruptcy Code, 11 AM. BANKR. INST. L. REV. 411, 432

buyers seeking the protections of no possibility of appeal should be treated as suspect.<sup>380</sup> Thus, limiting mootness, and the potential for its abuse, is appropriate. Courts should demonstrate a willingness to consider equitable considerations for statutory mootness in a similar fashion to all other bankruptcy matters, so that incentives for expedition to cloak abuse in mootness do not exist. Additionally, courts should always allow appeals on the issue of good faith, since the lack thereof fails to comply with the *good faith* purchaser requirement of § 363(m).<sup>381</sup> Not allowing such appeals does not further the interest of finality, but creates a perverse incentive for buyers.

The Supreme Court has reiterated that “[t]he need for expedition, however, is not a justification for abandoning proper standards.”<sup>382</sup> The proper standards and protections throughout chapter 11 should apply to § 363 sales, even where the justification for an emergency sale exist.

### CONCLUSION

Section 363 sales are an important tool in bankruptcy. The public has an interest in concluding bankruptcies quickly and efficiently.<sup>383</sup> But, efficiency comes at a price: a less thorough process, creating vulnerabilities to creditors’ rights. A long appeals process does not serve the interests of efficiency. Like all due process, there must be a balance between protecting the most sacrosanct of procedural rights (a fair chance to protect one’s property and the right to appeal an unjust verdict) and what is reasonable under the circumstances. Any solution to a problem in bankruptcy must evaluate not only the interests of the debtor (and future debtors) in a vacuum, but also the creditor’s potential deprivation of property and the subsequent loss of review on appeal.<sup>384</sup> Congress included § 363 in recognition of the fact that reorganization plans are not always practical; nonetheless, there should be a greater onus on the party

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(2003) (citing *In re Chandlier*, 292 B.R. 583, 588 (Bankr. W.D. Mich. 2003) (stating the doctrine of necessity allows payment in chapter 11 case under very extraordinary circumstances)).

<sup>380</sup> Cf. Craig A. Sloane, *supra* note 14, at 60 (citing *In re Public Serv. Co.*, 90 B.R. 575, 581–82 n.7 (Bankr. D.N.H. 1988)) (“Congress could not have intended for the extensive disclosure requirements under § 1125 to be superseded by mere notice and the remaining chapter 11 protections reduced to the ‘business justification’ test.”).

<sup>381</sup> See *supra* Part II.D.3.

<sup>382</sup> Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 450 (1968); see also *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (“We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.”).

<sup>383</sup> Jones, *supra* note 104, at 266.

<sup>384</sup> See Eisenberg & Gecker, *supra* note 120, at 62.

seeking to avoid the chapter 11 protections to show that the remedy is not only necessary, but also in good faith and protects creditor rights.

The mootness provisions and doctrines in bankruptcy highlight and protect bona fide purchasers. However, as integral to bankruptcy as these principles are, they cannot swallow the integrity of the system's foundation: its process. The uproar after *Chrysler* and *GM* were examples of high-profile incidents, which could lead creditors to become more apprehensive about lending companies money.<sup>385</sup> This Comment does not call for a guarantee to an appeal. Rather, it calls for a consistent application of equitable principles in the universe of mootness. Treating mootness consistently in chapter 11 reorganizations and § 363 sales preserves the bankruptcy judge's equitable powers without creating an expedited loophole that can compromise the protection of creditor's rights.

ALLA RAYKIN\*

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<sup>385</sup> See *supra* note 29 and accompanying text.

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APPENDIX A

The below charts were made using data from the UCLA-LoPucki Bankruptcy Research Database. The data is somewhat limited, but should serve as an adequate indicator of general trends. The universe of data includes only debtors who had assets of \$100 million or more, and filed an annual report (10-K) with the Securities and Exchange Commission.

CHART 1 – 363 SALES OVER TIME

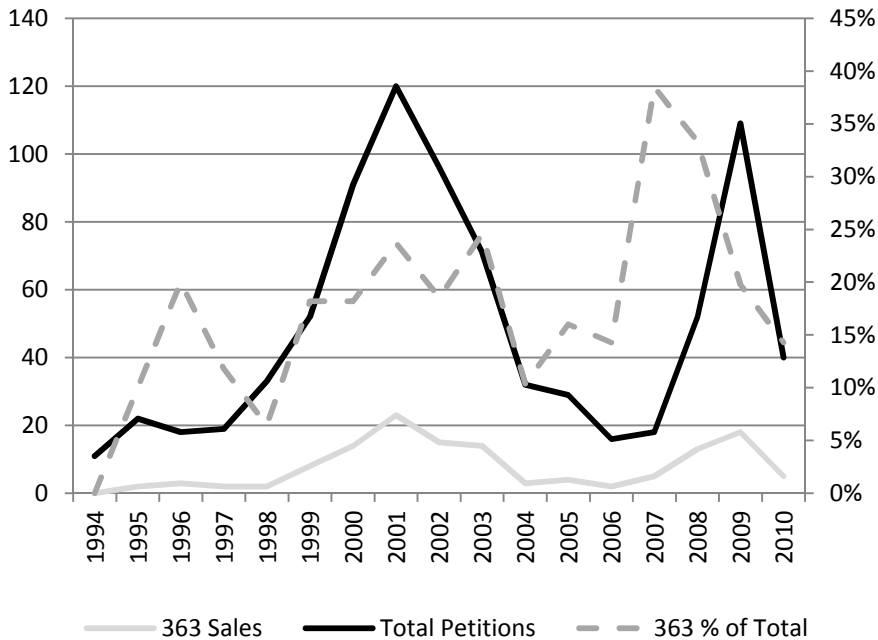


CHART 2 – 363 SALES IN THE THIRD CIRCUIT

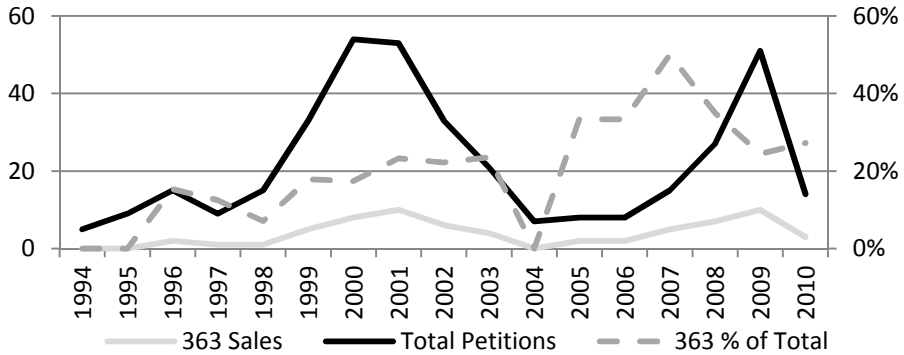
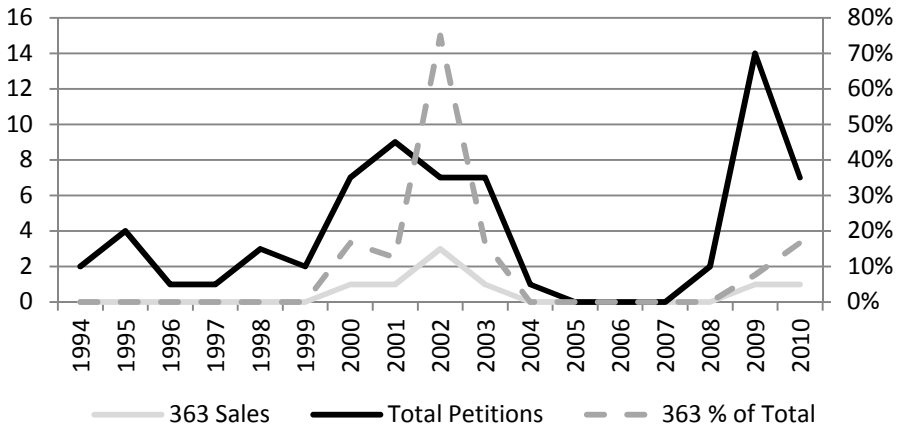


CHART 3 – 363 SALES IN THE NINTH CIRCUIT



APPENDIX B

The below chart was compiled using data from West. The data consists of all § 363 sales that came up in a search for trial court documents motioning for § 363(b) sales. While the data compares the entire Ninth Circuit to district courts, and only represents a sample, it demonstrates there was no aberration in the general volume of sales in Ninth Circuit in comparison with other courts after the *Clear Channel* decision.

