Section 363 Sales In Chapter 13©

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I. Who Sells Estate Property By The Seashore In Chapter 13?

Section 1303 states the rights and powers of a Chapter 13 debtor. These rights and powers are based upon references to specific subsections of §363. Even though §363 states that some of the listed powers are trustee powers, §1303 reverses that, stating: “Subject to any limitations on a trustee under this chapter [Chapter 13], the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.” Thus, in Chapter 13, a debtor is vested with some of the powers of a trustee. See, In re Dawson, 411 B.R. 1, 22 (Bankr. D.D.C. 2008).

Included in Section 1303's list of a debtor's powers and duties is §363(b), a provision that states: “The trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, . . .” See, §363(b)(1).

The powers and duties of a Chapter 13 trustee are stated in Section 1302. These powers and duties are enumerated by referenc to specific powers and duties that Chapter 7 trustees have, as set forth in §704. The list of Chapter 13 Trustee powers and duties in §1302 does NOT include §704(a)(1), which states: “(a) The trustee shall – (1) collect and reduce to money the property of the estate for which such trustee serves, . . .” Thus, “marshaling the assets of the estate is not one of the Trustee's enumerated duties”. In re Johnson, 409 B.R. 459, 462 (Bankr. N.D. Ohio 2009).

As several courts have recognized, Chapter 13 debtors are, in some ways, analogous to Chapter 11 debtors in possession. See, Smith v. Rockett, 522 F.3d 1080, 1082 n.2 (10th Cir. 2008)("debtor in possession" is a term of art found only in the Chapter 11 context. However, "the Chapter 13 debtor has been considered analogous to Chapter 11, which grants the debtor full authority as representative of the estate typical of a trustee."); citing, Cable v. Ivy Tech State College, 200 F.3d 467, 472 (7th Cir. 1999); Campion v. Credit Bureau Servs., 206 F.R.D. 663, 669 (E.D. Wash. 2001).

Other courts have focused on the idea that Chapter 13 debtors are not generally vested with the powers of a Chapter 11 trustee. See, In re Dawson, 411 B.R. 1, 22 (Bankr. D.D.C. 2008). Instead, a Chapter 13 debtor is vested with only some of the powers of a trustee. Id.

Regardless of the precise limits placed on the Chapter 11 DIP analogy, the Bankruptcy Code provides that Chapter 13 debtors have the power to sell property, outside the ordinary course of business, with court permission, under §363(b).

So, while there may be specific circumstances where a Chapter 13 trustee is given court permission to sell property, as a general rule

Section 363 sales are conducted pursuant to the terms of the Chapter 13 Plan and/or a §363 Motion to sell property filed by the Chapter 13 debtor. The debtor is the seller and the movant.

II. Why Sell Estate Property In Chapter 13?

In many instances, there will be no need to sell property. In fact, in many (if not most) Chapter 13 cases, the goal is to avoid the necessity of a sale of property to pay debts.

Where a debtor simply wants out from under the obligations associated with encumbered property, surrendering the property is usually sufficient for the debtor's purposes. But, where there is equity in the property that may disappear in a foreclosure sale, it may be in the debtor's best interest to sell the property in the Chapter 13, and apply the proceeds from the sale to pay debts, either at the closing table or through the Plan.

Another reason to sell property in a Chapter 13 could be to avoid a big deficiency judgment that may result from simply surrendering property. While secured creditors often forget to file deficiency claims (or cannot filed deficiency claims because of state laws prohibiting them) if a large deficiency claim is a substantial concern for the debtor, a sale of the property may produce a better result than a foreclosure, or a bank sale of the asset.

A §363 sale of the debtor's residence, for a higher price than a foreclosure sale, may also provide a benefit to the debtor based on the debtor's ability to exempt and retain a greater amount of the proceeds.

There are also cases where the debtor owns multiple properties (or businesses), with equity, and the debtor wants to keep one or more of them. Selling the other assets may provide the cash to allow the debtor to retain the assets that are most beneficial going forward.

Selling property is also a way to meet the requirements of the Best Interest of Creditors Test. See, §1325(a)(4). If creditors are paid in full, it moots any Best Interest of Creditors problems. Or, if a debtor does not have sufficient income to “buy back” all of the equity in their property from monthly income, selling some of the property with equity may allow other property with equity to be retained through monthly payments that meet the reduced amount needed to pass the Best Interest of Creditors Test.

III. Sale Proceeds And The Requirement That A Chapter 13 Debtor Have Regular Income.

Chapter 13 eligibility requires that an individual have “regular income”. See, §109(e). It appears that most bankruptcy courts hold that a debtor with “income” consisting solely of non-ordinary course sale proceeds, to be realized in the future, will not satisfy the “regular income” requirement. See, In re Lindsey, 183 B.R. 624, 627 (Bankr. D. Idaho 1995)(“Nor may debtors use the sale of property to avoid the eligibility requirements of §109(e).”); In re Gavia, 24 B.R.

573, 575 (9th Cir. BAP 1982); In the Matter of Anderson, 21 B.R. 443, 445 (Bankr. N.D.Ga. 1981).

Many commentators do not completely agree with this case law. Collier on Bankruptcy states: “In keeping with the aim of increasing the flexibility of chapter 13 relief, section 1322(b)(8) permits the filing of a liquidating plan in chapter 13 cases. There is no requirement that any of the debtor's future earnings or income be submitted to the supervision and control of the chapter 13 trustee for the execution of the plan, except as required by the plan itself. 8 Collier on Bankruptcy, ¶1322.12 at 1322-48 (16th ed. 2011).

Judge Lundin has written that a sale of property should satisfy the requirements of §109(e). See, Lundin, Chapter 13 Bankruptcy, §9.11. He argues that if a sale of inventory by business produces income that will satisfy the regular income requirement, why not a sale of real estate, or a business?

Arguably, the difference is that while sales of inventory by a business have been going on for years – and therefore are “regular” – a sale of real estate, or a business, in a Chapter 13 has never happened before and will never happen again. The Bankruptcy Code defines “individual with regular income” as an “individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, . . .” See, §101(30); In re Anderson, 21 B.R. 443, 446 (Bankr. N.D. Ga. 1981)(noting the requirements of “stability and regularity” [emphasis in Anderson] and the ability to make “payments”, plural, in the definition).

Unlike other income that comes in periodically – even over long periods, like crop proceeds for a farmer – the non-ordinary course sale of property is going to be a “one-off” transaction. There is nothing “stable” or “regular” about this type of income – both terms seem intended to ensure a greater likelihood of future income coming into the Chapter 13 Plan based on the recurrence of events that happened repeatedly in the past. A future sale, of an asset that the debtor has never sold before, does not seem to fit as income that is either “regular” or

“stable”. If Congress had wanted to use another descriptive term to mean, merely, that the future income was relatively certain to be received, it could have done so.

Accordingly, it appears that the majority of courts have been reluctant to approve a Chapter 13 Plan that is purely a liquidation. "The appropriate recourse for the debtors whose plan is nothing more than a liquidation is Chapter 7, not Chapter 13." In re Hungerford, 2001 Bankr. LEXIS 2222 (Bankr. D. Mont. March 22, 2001), quoting, In re Gavia, 24 B.R.573, 575 (9th Cir. BAP 1982).

Some courts have gone as far as declaring, “clearly it was never intended that a Chapter 13 plan would be funded by the sale of properties. . . .” In re Redditt, 146 B.R. 693, 700 (Bankr. S.D. Miss.

1992), quoting, In re Tillery, 124 B.R. 127, 128-129 (Bankr. M.D. Fla. 1991); but see, §1322(b)(8).

On the other hand, if an individual has some regular income, nothing in the Bankruptcy Code prohibits the use of sale proceeds to fund part of the Chapter 13 Plan.

For example, in In re Bassett the debtors only had rental income of $1,025, plus $50 a month from selling jewelry, with well over $500,000 in secured debt. Yet, the Bassett court held:

Debtors' Schedule I shows regular income from rentals at the Cottage Inn, plus $50 from operation of the business. Keith verified the rental income and business income in his sworn testimony, and no evidence to the contrary exists in the record. Based on Keith's uncontroverted testimony and Debtors' Schedule I, the Court finds that Chase's objection based on §109(e) is without merit and that the Debtors are eligible under §109(e) and §101(30) as individuals with regular income.

In re Bassett, 413 B.R. 778, 787 (Bankr. D. Mont. 2009).

IV. How Does The Sale Of Property Affect The Chapter 13 Plan?

A. Section 1322(b)(8) - Sale Proceeds Can Be Part Of The Plan.

Section 1322(b)(8) states:

(b) Subject to subsections (a) and (c) of this section, the plan may –

(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor.

Most courts have held that this provision allows the repayment of Chapter 13 creditors to come from the sale of assets. For example: “The plan may also propose to sell property or refinance it in order to pay claims. See e.g., In re Hogue, 78 B.R. 867, 870-871 (Bankr. S.D. Ohio 1987). This is specifically permitted by 11 U.S.C. §1322(b)(8).” In re Kincaid, 316 B.R. 735, 742 n.11 (Bankr. E.D. Cal. 2004); see also, In re Newton, 161 B.R. 207, 217 (Bankr. D. Minn. 1993) (“§1322(b)(8), which allows a plan to "provide for the payment of all or part of a claim . . . from property of the estate or property of the debtor," explicitly contemplates sale proceeds as a source of payment.”); In re Ratmansky, 7 Bankr. 829, 832 (Bankr. E.D. Pa. 1980).

The difficult question is: under what circumstances can a Chapter 13 Plan be approved that contemplates a sale of assets being responsible for generating part or all of the funding of the Chapter 13 Plan?

B. Is The Sale Too Speculative?

Under §1325(a)(6), one necessary element for the confirmation of a Chapter 13 plan is that “the debtor will be able to make all payments under the plan and to comply with the plan.” Where a proposed sale is

too uncertain, the debtor cannot show that the Chapter 13 Plan is feasible, and confirmation must be denied.

As a general rule, bankruptcy courts have found that a plan which provides for a single lump sum payment to creditors, at or near the end of the plan term, from a possible sale of the debtor's real property is not feasible. 8 Collier on Bankruptcy P 1325.07[1] at 1325-47, 48 (15th ed. 2009); In re Hogue, 78 B.R. 867, 872 (Bankr. S.D.Ohio 1987). In re Gavia, 24 B.R. 573 (B.A.P. 9th Cir. 1982). E.g. "[Where the consummation of a Chapter 13 plan hinges entirely upon the happening of a speculative, contingent event, scheduled to occur some three to five years from the date of confirmation, such a plan simply cannot meet the feasibility requirement of §1325(a)(6)." In re Hogue, 78 B.R. at 873-874. In In re Gavia, the court stated that "a construction that permits sole payment from liquidation of the debtor's property would render 11 U.S.C. §109(e) meaningless and eliminate any difference between a Chapter 7 liquidation and a Chapter 13 debt adjustment." 24 B.R. at 575.

In re Lynch, 2009 Bankr. LEXIS 1863 at *8-*9 (Bankr. E.D.N.Y. 2009); see also, In re Vieland, 41 B.R. 134, 140 (Bankr.N.D.Ohio 1984)(finding that §1322(b)(8) cannot be used if the sale is merely speculative); In re Tucker, 34 B.R. 257, 263 (Bankr.W.D.Okla. 1983)(finding that

"debtors must do more than simply state that assets will be sold sometime in the future[;] they must bear the burden of showing a likelihood of consummating their proposed sale.").

However, there is a line of cases which takes a different view, focusing on feasibility, and yet still allowing the Chapter 13 Plan to be funded primarily by a single lump sum payment, even later in the Chapter 13 Plan. See, In re Crawford, 2012 Bankr. LEXIS 1163 (Bankr. D. Colo. March 19, 2012); In re Mastel, 2010 Bankr. LEXIS 164 at *15, 2010 WL 234971 at *5-*6 (Bankr. D. Mont. Jan. 15, 2010); In re Valdez, 2007 Bankr. LEXIS 1789 (Bankr. D.N.M. May 17, 2007).

C. How Does A Debtor Make A Sale Less ‘Speculative'?

Courts are concerned about the means by which the sale will be conducted, and the time period within which the sale is to be made. See, In re Newton, 161 B.R. 207, 217 (Bankr. D. Minn. 1993)(“means” and “duration”).

Sales that are required to be completed within shorter periods of time are less subject to the objection that they are too speculative. See, In re Jensen, 369 B.R. 210, 236-237 (Bankr. E.D. Pa. 2007)(“Importantly, the plan also provides that if an agreement of sale is not signed within 180 days after confirmation, the case is subject to dismissal. Accordingly, I am satisfied that her plan is workable.”). For example, if the Chapter 13 Plan proposes to sell property within six months, a year, or 18 months, it is going to be less subject to a “too speculative” objection than a Chapter 13 Plan that proposes to fund the Plan with a single lump sum payment in month 60. See e.g., In re Snyder, 420 B.R. 794 (Bankr. D. Mont. 2009)(shortened drop dead date, in the event property was not sold, made Plan confirmable).

Courts have looked at a number of factors in evaluating Chapter 13 property sales. The Crawford court recently listed the following criteria:

In evaluating the feasibility of sale plans, those courts have considered evidence related to (a) the amount of the creditor's claim; (b) the state of the market for the subject asset; (c) current sale prospects; (d) the existence and maintenance of any equity cushion; (e) the terms of the debtor's listing agreement, including the listing price for the subject asset and plans for marketing it; and (f) whether or not the plan includes a default or "drop dead" remedy either to relieve the mortgagee from the automatic stay or to convert the case to another chapter if the sale does not close by the end of the proposed cure period.

In re Crawford, 2012 Bankr. LEXIS 1163 at *28-*29 (Bankr. D. Colo. March 19, 2012); See also, In re Mastel, Case No. 09-60784-13, 2010 Bankr. LEXIS 164, 2010 WL 234971 * 5-6

(Bankr. D. Mont. Jan. 15, 2010)(listing considerations); In re Erickson, 176 B.R 753, 756-57 (Bankr. E.D. Pa. 1995)(listing possible considerations and citing considerations listed by court in In re Newton, 161 B.R. 207, 217-18 (Bankr. D. Minn. 1993), as well taken).

1. The amount of the creditor's claim.

If the objecting creditor's claim is smaller, the court may be more inclined to allow a sale of the property as part of the Chapter 13 Plan.

2. The state of the market.

Obviously, in depressed, stagnant markets, courts are going to be less inclined to find that the proposal to market and sell property is going to be feasible. The cases suggest that debtor's counsel is going to have to put on some evidence regarding the current state of the market for the property that the debtor is trying to sell.

Since the real estate downturn, courts have cited the “depressed real estate market” as a reason for finding a Chapter 13 plan that depends on the sale of real estate to be “speculative” and therefore not feasible. In re Lynch, 2009 Bankr. LEXIS 1863 at *14 (Bankr. E.D.N.Y. 2009)

3. Current sales prospects.

This is a very important element for debtors to show. Courts want to know what is being done to market the property, and if anyone has shown any interest in it.

a. Courts will factor in how the property is titled.

If the debtor does not have title to the property, and there are necessary steps that must be taken before the property is sold – such as

probating an estate – this can negatively effect a bankruptcy court's view of the “current sales prospects”.

4. The existence of an equity cushion.

Again, this is a major factor that appeared to influence courts that permitted future sales proceeds to stand substitute for regular installment payments. If the property to be sold has a very large, undisputed equity cushion, that can be a key fact in favor of the debtor. See, In re Valdez, 207 Bankr. LEXIS 1789 at *10-*11 (Bankr. D.N.M. May 17, 2007); In re Launderville, 2011 Bankr. LEXIS 4003 at *13 (Bankr. D. Mont. Oct. 14, 2011)($80,000 equity cushion based on creditor's valuation of the property); Cf., In re Vanasen, 81 B.R. 59, 62 (D. Or. 1987)(allowing sale of real estate in response to a motion for relief from stay based, in part, on

the equity cushion – “Here, the Bank has an adequate security cushion which protects it from economic harm.”).

Not surprisingly, a smaller, disputed equity cushion is not going to impress the bankruptcy court as much as a larger undisputed equity cushion. See, I n re Newton, 161 B.R. 207, 216-217 (Bankr. D. Minn. 1993)(court found a $13,400 to $22,000 equity cushion, but confirmation was denied).

5. The terms of the debtor's listing agreement, including the listing price for the subject asset and plans for marketing it.

The terms of the debtor's listing agreement will include the percentage that the seller's broker, agent, or auctioneer is going to receive, the provisions for marketing the property, and any conditions, limitations, incentives or approvals that are needed for the property to sell.

Obviously, the list price is going to also be an important fact that courts will look at. If the listing price is substantially higher than the value listed in the Schedules, the debtor is going to have some explaining to do. Bankruptcy courts are well aware that Chapter 13 can be used for purposes of delay. A disconnect between the fair market value of the property, and a higher listing price, may be taken as a sign that the debtor's real goal is not effectuating an expeditious sale of the property.

The marketing plan is also important. A well thought out campaign to sell the property quickly is what bankruptcy courts are looking for when evaluating asset sales.

For sales of real estate, putting the real estate broker with the listing contract on the stand appears to be almost a necessity for Chapter 13 debtors who are facing significant opposition to a proposal to sell property under Section 363.

Even courts that would be inclined to allow Chapter 13 cases relying on future sale proceeds are not going to be impressed if no marketing

efforts have been commenced. Debtors must do more than simply assert vague ideas about selling the property when they get around to it.

6. A default remedy as part of the proposed asset sale.

The existence of a default remedy is one of the factors that courts look at in Chapter 13 Plans that propose asset sales. See, In re Newton, 161 B.R. 207, 217 (Bankr. D. Minn. 1993)(“The plan . . . should also incorporate a default remedy . . .”).

One of the most effective ways to rebut an objection that the proposed sale is “too speculative” is setting up – in the Plan – a fallback position or “default remedy”. Default remedies include provisions that, if a private sale of the property is completed by a date certain: 1) the property in issue sold at public auction; 2) relief from stay will be granted to the creditor; 3) the case will be converted to Chapter 7; or 3) the debtor will vacate and surrender the property.

For example, the debtor's Chapter 13 Plan may say that real estate will be listed for sale with a licensed real estate broker for 12 months, then the property will be listed and sold to the highest bidder at public auction within 4 months. Courts may look more favorably on a Chapter Plan where there is a backstop mechanism to get the property sold. On the other hand, a court may look on a Chapter 13 Plan less favorably if the Plan is silent as to what happens if there is a failure to sell the property.

The bankruptcy court is going to be concerned if all of the control of the sale is with the debtor. Again, bankruptcy courts are well aware that Chapter 13 can be used as a delaying tactic. To the extent there is a default remedy, and a shorter time window in which a sale must take place, those concerns can be lessened.

One common default remedy is the granting of relief from stay to the secured creditor, on an ex parte basis, if the property does not sell by a stated deadline. See, In re Newton, 161 B.R. 207, 218 (Bankr. D. Minn. 1993). Sometimes, similar relief is provided by a provision that the debtor will vacate and surrender the property – or simply let the creditor have it. See, In re Snyder, 420 B.R. 794, 801 (Bankr. D. Mont. 2009).

The Chapter 13 Plan could also call for conversion of the case to Chapter 7 liquidation proceeding if the property is not sold by a date certain. See, In re Mastel, 2010 Bankr. LEXIS 164 at *15, 2010 WL 234971 at *5-*6 (Bankr. D. Mont. Jan. 15, 2010)(“Debtors' Plan has a "drop dead" provision in paragraphs 1 and 2(b), which allows the Court to . . . convert the case to Chapter 7 or dismiss the case if the Debtors' property does not sell before April 30, 2011. The inclusion of the "drop dead" provision in Debtor's Plan weighs in favor of a finding of feasibility listing considerations.”).

The Bassett court found the existence of a “drop dead” provision – in that case, conversion to Chapter 7 - an important factor in determining feasibility:

“Debtors' Plan has a "drop dead" provision in paragraph 1, which allows the Trustee to liquidate the Debtors' real estate in Flathead County "(either residential or commercial)" himself through a court approved process, or else convert the case to Chapter 7 if the Debtors' property does not sell before October 29, 2010.

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The inclusion of the "drop dead" provision in Debtor's Plan weighs in favor of a finding of feasibility.”

In re Bassett, 413 B.R. 778, 788-789 (Bankr. D. Mont. 2009).

Where the debtor fails to make any provision for remedies that would be accorded to the secured creditors of the projected sale is unsuccessful, courts have found that to be a factor weighing against confirming a Chapter13 Plan that relies, in whole or in part, on sale proceeds. See, In re Erickson, 176 B.R. 753, 757 (Bankr. E.D. Pa. 1995)(“It makes no statement regarding remedies accorded to the secured creditors of the projected sale is unsuccessful. Compare Calvanese, supra, 169 Bankr. at 109 (confirmation denied when debtors failed to expressly allow the objecting creditor to foreclose if the projected sale were unsuccessful).”).

While a default remedy is listed in many cases as an important factor, the absence of a default provision not always an insurmountable obstacle to confirmation. For example, In re Crawford, 2012 Bankr. LEXIS 1163 at *31 (Bankr. D. Colo. March 19, 2012) stated:

d. Default Provision

Debtor's Amended Plan includes no default remedy that addresses the possibility that Debtor might not be able to sell the Farm Property within a reasonable time. When asked about this, Debtor's counsel indicated that if the Farm Property were not sold within the plan period, Debtor would seek modification of the Amended Plan.

That's not just a failure to put in a default provision. That is the debtor keeping her options open to propose a modification that could involve further delay. And the Crawford court still found that confirmation was appropriate – not even requiring an amendment to the debtor's Chapter 13 Plan.

In contrast, the court in Newton stated that a point in the debtors' favor was: “their offer of a grant of relief from stay to Investors on an expedited, ex parte basis if they do not cure in full by the end of the 18-month period they propose, or if they default in any payment to the Trustee in the meantime.” In re Newton, 161 B.R. 207, 218 (Bankr. D. Minn. 1993). The Newton Court denied confirmation, despite inclusion of that provision.

7. The reality of the creditor's situation.

The bankruptcy court in Dunn compared the “delay” in confirming the Chapter 13 Plan – that gave the creditor immediate relief from stay, with the delay inherent in the collection process

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under state law. In re Dunn, 399 B.R. 909, 912 (Bankr. W.D. Wash. 2009). Under some circumstances, this type of argument – comparing the Plan provisions with the delay the creditor faces in state court - may be an effective tool for debtors seeking to confirm a Plan that depends on sale proceeds for feasibility.

D. Don't Forget Good Faith.

“Even where a Chapter 13 plan does not violate §1322(b) and is funded in part by payments from the debtors' income, courts have been particularly cautious when considering the good faith requirement . . . .” In re Lindsey, 183 B.R. 624, 627 (Bankr. D. Idaho 1995); In re Mastel, 2010 Bankr. LEXIS 164 at *15 (Bankr. D. Mont. Jan. 15, 2010)(“issues of good faith, feasibility and adequate protection arise when a plan proposes only token monthly payments to the secured creditor.”).

One short war story – I recently had a Chapter 13 Plan filed that proposed to pay 1 Cent a month for 60 months, with payment from the sale of property to pay off the Plan, in a lump sum, by month 60. I explained that I didn't think that was fair, that the debtor could keep the creditors off her back for 59 months, dismiss her case, and leave me with barely enough money to buy a postage stamp to send out the Fifteen Cents I would have left to distribute to one unsecured creditor, presumably of my choosing. I thought that kind of a Chapter 13 plan was “buying the stay too cheap”. Even with the Plan term cut down to 18 months, the judge indicated that she would not confirm the “one cent a month” Plan.

E. Some Random Things That Are Bad For A Chapter 13 Plan Dependent On A Sale.

The Newton court not only listed the elements that would support a Chapter 13 plan proposing “cure-by-sale”, it also listed factors that would weight against confirming such a Chapter 13 plan:

If the debtor cannot produce anything more than remote speculation as to the terms or date of a sale; if market conditions are eroding the value of the collateral; if the debtor's efforts at a sale are not directed or energetic enough; or if any other factors demonstrate that the creditor will not receive the value of its secured rights within a circumscribed, specified, and "reasonable" cure period, the court cannot confirm the plan.

In re Newton, 161 B.R. 207, 218 (Bankr. D. Minn. 1993).

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The existence of ancillary, complex litigation regarding the property that the debtor is proposing to sell is also a factor weighing against confirmation. See, In re Nantz, 75 B.R. 617 (Bankr. E.D. Mo. 1987).

Proposing to start selling the property at some future time is a negative. The debtor should be actively marketing and trying to sell the property at the time of the confirmation hearing, to the extent permitted by the court. See, In re Issaac, 2005 Bankr. LEXIS 2839 (Bankr. N.D. Ill. Nov. 16, 2005)(“Plans proposed by the debtors where there is a long delay (three to five years) between the date of confirmation and the proposed sale/refinancing of a debtor's residence impose unreasonable delay on creditors. The longest delay in the proposed liquidation of a debtor's property contemplated in any of the reported decisions revealed by the Courts' research was six months; and, even this relatively short delay was disapproved due to feasibility concerns. See In re Gavia, 24 B.R. 573 (B.A.P. 9th Cir. 1982). But see, In re Crawford, 2012 Bankr. LEXIS 1163 at *28-*29 (Bankr. D. Colo. March 19, 2012)(property to be sold during 36 month Chapter 13 Plan).

Indeed, in virtually all of the reported decisions, the plans under consideration called for immediate marketing and sale (or refinancing) of the asset(s) to be liquidated. See, e.g., In re Anderson, 28 B.R. 628 (S.D. Ohio 1982) (affirming confirmation of Chapter 13 plan proposing immediate sale of debtor's farm despite "far from ideal" market conditions where the Bankruptcy Court required monitoring of the continued feasibility of the plan through periodic progress reports to the Chapter 13 trustee); In re Hogue, 78 B.R. 867, 874 n. 9 (Bankr. S.D. Ohio 1987).

F. The Limitations On Debtor's Ability To Buy Time.

1. Attempts to substitute future sale proceeds for current monthly payments on the debtor's primary residence.

Attempts have been made to craft Chapter 13 Plans that allow the withholding of contractual installment payments on the mortgage while the primary residence is marketed and sold. Many courts have rejected Chapter 13 Plans with such provisions, but that position is not universally endorsed.

For courts that reject any sort of Chapter 13 Plan provision allowing deferral of monthly payments pending a sale, the reasoning generally follows the analysis set forth in In re Gavia, 24 B.R. 573, 575 (9th Cir. BAP 1982). The Gavia decision relies heavily on the fact that §1322(b)(2) prohibits the modification of the rights of a secured credit whose only security is the debtor's principle residence.

Notwithstanding the prohibition on modification stated in §1322(b)(2), debtors have point to the Code section giving them the ability to cure a default in a reasonable period of time. See, §1322(b)(5).

The problem is, deferring payments IS generally held to be a modification, and courts hold that it is NOT in furtherance of curing the arrearage. As the Gavia court stated: “Withholding current

installments, however, creates rather than cures a default.” In re Gavia, 24 B.R. 573, 575 (9th Cir. BAP 1982); see also, In re Proudfoot, 144 B.R. 876, 878 (9th Cir. BAP 1992); In re Newton, 161 B.R. 207, 217 (Bankr.D.Minn. 1993)(“any proposal to toll a debtor's obligation of periodic debt service works a modification of the mortgagee's contractual rights in violation of § 1322(b)(2), whether the tolling is indefinite or for a fixed term."); In re Lindsey, 1983 B.R. 624, 627 (Bankr. D. Idaho 1995)(“Nor can sale of the debtor's homestead or other property be used to circumnavigate the anti-modification requirements of sections 1322(b)(2) and (5).”).

The rebuttal to Gavia, at least in many Chapter 13 cases, is found in In re Dunn, 399 B.R. 909, 911-912 (Bankr. W.D. Wash. 2009): “It bears recall at this juncture that the payment default here is not created by the Plan: Debtors were in default before the Plan was proposed, and the Bank's proof of claim indicates they were in default pre-petition.”

There is another position on this issue, which was adopted in the recent decision In re Crawford. The Crawford court held:

This Court agrees with the bankruptcy Court in In re Erickson [176 B.R. 753, 757 (Bankr. E.D. Pa. 1995] that Section 1322(b)(8), "appearing as it does directly after [section] 1322(b)(2) and (b)(5), clarifies that a sale plan is not contrary to the limitations and modifications of mortgages addresses elsewhere in [section] 1322(b)." Further, the Court agrees that Chapter 13 plans that provide for a sale of property to cure arrearages and provide for the payment of principal, interest, and any other amounts due under a note or deed of trust "do not per se modify secured creditors' rights; they merely delay immediate payment to creditors in consideration for what is often accelerated full payment." [Id.] Though debtors certainly have the option of providing for regular payments in chapter 13 plans, they are not required to do so under 1322(b)(5), which is permissive rather than mandatory. [In re Powell, 29 B.R. 346, 349 (Bankr. D. Colo. 1983).] Where a debtor has ample resources to pay a claim, but those resources are tied up in a real property encumbered by a creditor's security interest — as is the case here — section 1322(b)(8) allows a court to confirm a plan in which the debtor proposes to pay off that claim within a reasonable amount of

time through the sale of the real property. Accordingly, there is nothing improper about this Debtor's proposed deferral of payment to Chase until sale occurs.

In re Crawford, 2012 Bankr. LEXIS 1163 at *27-*28 (Bankr. D. Colo. March 19, 2012).

Crawford is pretty much the gold standard for debtor-friendly decisions on this issue – the Plan that was confirmed allowed the debtor to stay in the house, and pay nothing to the secured creditor for the maximum period of the entire 36 month Plan term (and the Crawford court even discussed the possibility of amendment, extending the Plan length).

2. Adequate protection

The Bankruptcy Code's adequate protection requirements present another obstacle for Chapter 13 debtors proposing a Plan that is to be funded from sale proceeds.

“Section 1322(b)(8) allows a plan to be partially funded through the sale of property of the estate or property of a debtor, but issues of good faith, feasibility and adequate protection arise when a plan proposes only token monthly payments to the secured creditor.” In re Mastel, 2010 Bankr. LEXIS 164 at *15 (Bankr. D. Mont. Jan. 15, 2010).

Moreover it has been held that: “a speculative funding source is insufficient to provide adequate protection.” In re Ziegler, 88 B.R. 67, 70 (Bankr. E.D. Pa. 1988)(proceeds from lawsuit too speculative for adequate protection).

The concept of adequate protection also limits the use that can be made of the money after the property is sold. In Werden, for example, the debtor wanted to sell lots and use the money to complete a development, rather than turning over the sale proceeds from the lots to the secured creditor. The court stated:

“[I]t is generally accepted that adequate protection is provided by having existing security interests attach to the proceeds of a § 363(f) sale. See Circus Time, Inc. v. Oxford Bank & Trust (In re Circus Time, Inc.), 5 B.R. 1, 3 (Bankr. D. Me. 1979). See also Collier on Bankruptcy, at P 363.06 ("It has long been recognized that the bankruptcy court [pursuant to § 363(f)] has the power to authorize the sale of property free of liens with the liens attaching to the proceeds . . . ."). The Plan envisions the proceeds of any lot sales to be directed toward the completion of the subdivision rather than to the interests of existing creditors. It is not clear how this strategy can be squared with the requirements of § 363(f).

In re Werden, 2000 Bankr. LEXIS 1787 (Bankr. D.N.H. Feb. 8, 2000).

3. The requirement that defaults on home mortgages be cured within a reasonable time and the anti-modification provision.

Section 1322(b)(5) provides that: “[A] plan may provide for the curing of a default within a reasonable time.” In re Dunn, 399 B.R. 909, 911 (Bankr. W.D. Wash. 2009); In re Mastel, 2010 Bankr. LEXIS 164 at *15, 2010 WL 234971 at *17 (Bankr. D. Mont. Jan. 15, 2010). This requirement is another factor that will lead bankruptcy courts to limit the amount of time debtors have to cure defaults using a “cure on sale” Chapter 13 Plan.

V. What Are Courts Looking For In Terms Of Evidence?

When counsel is facing a contested hearing on a debtor's Chapter 13 Plan that proposes to sell property as part of the funding mechanism for the Plan – what kind of evidence is a bankruptcy judge generally looking for from the debtor?

First, it is important to understand what the bankruptcy judges are usually worried about in these types of cases: 1) is this case a delaying tactic?; and 2) how likely is it that the proposed sale can be consummated on the terms that have been proposed?

Debtors can enter Chapter 13 for all kinds of reasons. One of the safeguards against the misuse of the Chapter 13 process is the requirement that debtors make monthly payments of all of their projected disposable income, or an amount that will pay unsecured creditors 100% over the life of the Plan.

Yes, we all understand that myriad issues that can complicate a determination of what the minimum monthy payment requirement should be under the Code. However complex it may be, that monthly payment requirement is a deterrent to long term misuse of the Chapter 13 process.

When a debtor proposes to make little or no payment into the Chapter 13 Plan, bankruptcy judges get suspicious of the debtor's motives. Is the filing simply a ruse to allow the debtor to stay in a home without paying the mortgage? Is this an attempt to thwart a domestic relations order requiring the sale of the property? Is the debtor trying to buy the automatic stay with a promise to sell property that the debtor never intends to keep?

To counter these concerns, debtor's counsel needs to present evidence as to why the prompt sale of the property serves the debtor's interests. The court needs to understand why the debtor is a highly motivated seller. If debtor's counsel can't paint that picture, the bankruptcy judge may see other motivations behind the proposed “pay on sale” Plan – motives that may not fit neatly under the commonly understood meaning of “good faith”.

The second aspect of the evidence that should be presented in support of a motion to sell, or a Chapter 13 Plan that depends on the sale of property for funding, is a demonstration of competence.

Bankruptcy judges have been exposed to numerous human beings with inflated ideas of the value of Elvis memorabilia, NASCAR souvenirs, Franklin Mint creations, Beanie Baby collections . . . . Why is your client's view of the value of the real estate firmly grounded in the realities of the market place?

And, if you can show that the value of the property is in the ballpark, you still have to demonstrate that the marketing and sales efforts for the property are going to be conducted in a professional manner.

A. The Evidence That Will Make Your Case A Loser.

A lawyer just talking to the judge is not evidence. Ever. But especially in trying to convince a bankruptcy judge to approve a Chapter 13 Plan that includes a sale of property.

Some examples of inadequate evidence in support of a proposal to sell property in a Chapter 13 case include:

The trial court had the following evidence before it. The Gavias listed their residence as having a total value of $49,000, with encumbrances of $37,000. They owed over $8,000 to 20 creditors. Therefore, they would have to find a purchaser willing to pay cash for their asking price to come close to complying with their plan to pay all creditors in full. There was no evidence before the trial court indicating that any marketing efforts had been made by the Gavias. The record is devoid of any indication that the Gavias had contacted a realtor, placed the home on the market or had any contact with any potential purchasers. The Gavias offered no evidence on the likelihood of a sale.

The Castillos, who listed over $10,000 in debts, filed schedules placing the value of their home at $52,000 with $37,000 of encumbrances. Again, these debtors would have to find a purchaser willing to pay the asking price within six months in order to comply with their plan. The only evidence regarding the marketing efforts of the Castillos was Mr. Castillo's testimony that the home had been listed with a broker and that an agent had told him "things might look better" in a month.

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Hubbard claims an equity in her home of $22,000. She lists less that $7,000 in known debts to creditors, but other debts are listed in "unknown" amounts. As to marketing efforts and the likelihood of sale, there was only the representation of Hubbard's attorney that there had been some "interest" in the home.

The trial court implicitly found that the appellants had not carried their burden of proving feasibility, i.e., that they were likely to consummate their plans. 11 U.S.C. § 1325(a)(6). We cannot say that this finding was clearly erroneous.

The Lindsey court was equally unimpressed with the evidence it was presented:

At the confirmation hearing, the debtor's testimony concerning her efforts to market the property were vague and often unresponsive. The debtor's past track record suggests she will not sell the property in a timely manner.

Accordingly, the debtor's amended plan is not feasible.

In re Lindsey, 183 B.R. 624, 628 (Bankr. D. Idaho 1995).

Similarly, in In re Newton, 161 B.R. 207, 218 n.14 (Bankr. D. Minn. 1993), the Newtons did not appear to testify,and their written responses contained little factual detail: “Their abbreviated presentation for the confirmation hearing 14 did not prove up the likelihood of a prompt sale and cure.”

B. The Evidence That May Make Your Case A Winner.

Earlier, the Crawford case was referenced as being the “gold standard” for debtor-friendly decisions allowing Chapter 13's to be funded by the

sale of property. One reason for that decision was “gold standard” evidence presented by the debtor, and on behalf of the debtor.

In addition to the extensive evidence presented regarding negligence and misconduct by the mortgage company in dealing the a mortgage modification – which doesn't hurt – the Crawford decision relied on the following:

After Debtor's modification was finally denied and she realized the Farm Property had to be sold, she worked diligently to sell it at top dollar. Starting in July 2011, through the fall, Debtor spent more than $4,400 to ready the Farm Property for sale,9 putting windows in the barn and staining it, painting the trim on the house, repairing the boiler, and maintaining the hot tub. Beyond that,

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Debtor and her son spent considerable time repairing fencing, clearing trees and brush, and running barbed wire throughout the 50-acre property. Debtor testified, credibly, that she undertook these repairs to make the house presentable for potential buyers as she did not want buyers to view the property with decks that looked unstained and worn. According to Debtor, her goal was to present the property in such a manner that it would sell quickly, and for a good price. The Property has been listed for sale since July 2011.

In re Crawford, 2012 Bankr. LEXIS 1163 at *10-*11 (Bankr. D. Colo. March 19, 2012).

In addition to the all the brush clearing, painting and fence mending the debtor was doing, she also had a real estate agent who testified at the hearing:

Debtor stated that it is her intention to sell the Farm Property as soon as possible. Debtor's real estate agent, Mike Shuttleworth, testified that the Debtor and he are actively marketing the property, and Debtor is working with him in this regard. So far, there have been five showings of the Farm Property, and there is some ongoing interest from one buyer, who is in the process of qualifying for a loan.

At present, the Farm Property is listed for $1,499,000, based on Mr. Shuttleworth's review of comparable properties. Mr. Shuttleworth acknowledged, however, that the average price of comparable properties10 is lower — perhaps as low as $1,150,000 — and that a downward adjustment in price in the spring, the beginning of peak sales season in Steamboat, might well be necessary to sell the Farm Property. Debtor testified that she would rely on Mr. Shuttleworth's professionalism in making the decision about whether to adjust the price, and that she would continue to work with him to sell the Farm Property quickly. Throughout the sales process, Debtor has cooperated with Mr. Shuttleworth to make sure the house is clean and presentable for showings.

In re Crawford, 2012 Bankr. LEXIS 1163 at *11-*12 (Bankr. D. Colo. March 19, 2012).

And finally – and this kind of thing never happened to me when I was in private practice – you have this little nugget:

In addition, Debtor is certified as a home stager and is trying to start a business that allows her to work in that capacity.

In re Crawford, 2012 Bankr. LEXIS 1163 at *12-*13 (Bankr. D. Colo. March 19, 2012).

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You probably are never going to get an enthusiastic, just graduated home stager to put on the stand. But, debtors counsel can make every effort to have a professional (or two) available to testify, like a real estate agent, an auctioneer, and/or an appraiser. Just as important is having a debtor who is willing to state that they will rely on the professionals to get the property sold quickly.

VI. How Do You Set Up A Sale Of Property In Chapter 13?

In order to have a sale procedure that the bankruptcy court can approve, the seller must demonstrate one of two things: 1) that the proposed sale price is reasonable; or, 2) that the proposed method of sale is reasonable.

Looking at the worst case scenario: a debtor is selling property and the proposed buyer is intended to be – or turns out to be - the debtor's brother. How is a court going to be comfortable with that kind of sale?

A. The Requirements For A Sale Under Section 363(f).

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

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

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

The requirements of Section 363(f) were considered in In re Penniston, 206 B.R. 948, 950 (Bankr. D. Minn. 1997) in terms of what information is required in a Motion to Sell:

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The motion asks that the sale be free and clear of "all liens, encumbrances, claims, judgments and tax liens …." without revealing the nature or extent of their interests in the property to be sold. This places the court in the position of having no information on which to evaluate the § 363(f) requirements and, at least as importantly, to determine whether or not those entities have even been served with the motion. The debtor also does not indicate what she proposes to offer these creditors by way of adequate protection for the loss of their interests in the property. Section 363(f) is not intended as a title clearing mechanism. Although the section can serve a similar purpose when disputes over interests might otherwise prevent a sale, it is not intended to facilitate a sale when there is no possible benefit to the bankruptcy estate.

When a sale under § 363(f) is proposed, it is incumbent upon the trustee, the debtor in possession, or the chapter 13 debtor to specifically identify the holders of the interests affected, provide a description of that interest as best the movant can, and to demonstrate that the requirements of § 363(f) are met as to each such holder of an interest. That clearly has not been done here.

For all these reasons,

IT IS ORDERED: The debtor's motion "for authority to sell, use or lease assets of debtors" is denied.

B. File A §363 Motion, Do It As A Plan Provision, Or Both?

The proper procedural path to a Chapter 13 sale is not entirely clear. The proposal to sell property should, where the decision to sell is made prior to Confirmation, be included as a Chapter 13 plan provision, if for no other reason, notice to creditors of what is going to happen.

Where there is a need for some fairly detailed provisions about the terms of the sale, then a Motion may be useful. Obtaining a detailed court order regarding how the sale will be conducted, and what will happen to the proceeds, can be very helpful on a number of levels. If an agreed order can be achieved with the secured creditor regarding the sale terms, so much the better.

Another consideration is the comfort zone of your title agency. They will prefer a detailed court order. So, that is another good reason to file a Motion to Approve Sale, or something similar.

There may be some concerns, particularly from a title company, about a sale that is to take place prior to the confirmation of the Chapter 13 Plan. Where the Chapter 13 Plan has not been confirmed, the property will not have “vested” in the debtor. This may create some uncertainty about the debtor's power to sell property, despite §1303 giving the debtor the “exclusive” power to sell under §363(b). A court order specifically permitting the sale would probably be an appropriate way to take care of any potential concerns about the debtor's ability to sell the property. If the court is the entity with the concern, the

Chapter 13 trustee might – if the sale seemed an appropriate way to proceed – file something indicating support for the proposed sale.

In some jurisdictions, there may be case law that allows sales of property without court approval, where the property is claimed as exempt and the time for objecting to the exemption has passed. See e.g., In re Penniston, 206 B.R. 948 (Bankr. D. Minn. 1997).

C. A Private Sale.

If the property is to be sold by private sale, there has to be evidence that the proposed sale price is reasonable. So, for example, if proof is presented to the court that gold consistently trades for $2,000 an ounce and the debtor's proposal is to sell an ounce of gold to the debtor's brother for $2,000, it may be approved even though the sale is to an insider. Of course, a creditor may come in and object based on the creditor being willing to $2,100 for the same one ounce of gold – but in the absence of such an objection, the bankruptcy court may find even a private sale to an insider to be proposed in good faith, based on evidence that the price to be paid is fair market value for the item being sold.

Of course, a lot depends on the quality of the information on the fair market value of the property being sold. The usual way to support a proposed private sale is through an appraisal, or several appraisals of the property's fair market value.

Another factor the court may look at is the length of time that the property has been exposed to the market. For example, if a parcel of real estate is marketed by a reputable real estate broker for 12 months for a list price of $180,000, and after the listing agreement expires, the debtor's brother comes in and offers to buy the property for $175,000, the length of time that the property was available for purchase is going to be big factor supporting the fairness of the brother's offer to purchase the property.

D. A Public Sale.

A public sale can be listing property with a realtor, or holding a liquidation sale, but most often the public sale method of choice is the public auction. There is nothing magical about the

auction method itself. For the auction sale to provide courts with the indicia of fairness needed to approve such a sale, the auction has to be a “well advertised” public auction. The time and place and method of the auction sale must also be reasonable.

E. Auction Issues.

Each state has its own laws regarding auctions and auctioneers. Some states require licensing, some do not. There is some uniformity regarding auction law because there is a section of the Uniform Commercial Code (“UCC”) that deals with auctions – Section 2-328. In

enacting the provisions of the UCC, each state renames the provisions according to its own statutory numbering system.

Under this section of the UCC, an auction sale of goods can be divided up into “lots”, and each lot is a separate sale. §2-328(1). An auction sale is completed when the hammer falls, or whatever other “customary manner” is used to indicate completion of the sale. §2-328(2). What to do when there is a bid while the hammer is falling is left to the auctioneer's discretion – the bidding can be reopened, or the goods can be declared sold. §2-328(2).

An auction sale is “with reserve”, unless there is an explicit statement that the goods are being sold “without reserve”. §2-328(3). Where there is a reserve, the auctioneer can withdraw the goods from the sale, or repackage them with other lots, until such time as the auctioneer announces the completion of the sale – usually by the hammer falling. §2-328(3).

Where a sale is “without reserve” – also known as an “absolute auction” – the goods cannot be withdrawn from the sale, after the auctioneer calls for bids, until a reasonable time has passed with no bidding. §2-328(3).

A bidder can retract a bid prior to the hammer falling, but that does not revive any previous bid. §2-328(3).

The restrictions on a sale “without reserve” cannot be circumvented by the seller bidding, or procuring a bid on his or her behalf. If the auctioneer knowingly receives such a bid, the buyer may may, at his option, avoid the sale or take the goods at the price of the last good faith bid made prior to the completion of the sale. §2-328(4). However, this provision does not apply at a forced sale. §2-328(4).

F. Is the sale going to be with, or without, reserve?

Usually, the sale is going to be with reserve – the reserve being a minimum price that is needed for the auction sale to be completed. This reserve may be dictated by how much money

the sale needs to generate to pay the Chapter 13 Plan according to its terms. Or, the reserve price can be dictated by the amount the debtor wants to get for the property.

G. If the secured creditor is not getting paid off at closing – who holds the sale proceeds?

If there is a real estate closing, and the secured creditors are to be paid at the closing table in return for their lien releases, there may be less of an issue regarding who holds the money.

But, when the amount owed to the secured creditor is disputed, it may not be possible to simply pay off the liens prior to a court determination regarding the amount that is actually owed.

Likewise, when there is a sale of property with disputed liens, the process can take long. The debtor may sell the property “free and clear of liens, with valid liens attaching to proceeds”. The parties can then litigate the validity of the security interests, or their priority if they aren't all being paid in full.

The problem is, while everything is getting sorted out, who holds the money? The debtor's attorney, in his or her trust account? The secured creditor, if it is a bank, in a separate account with monies to be disbursed only upon a final, non-appealable order of the bankruptcy court? Or are you going to try to force the Chapter 13 trustee to hold the money, through a bankruptcy court order? Or would some other arrangement better satisfy the parties who may have an interest in the sale proceeds?

H. Have you hired your professional(s)?

Bankruptcy courts have different views on the hiring of professionals in Chapter 13 cases. For some courts, if the realtor was hired pre-petition, that may be sufficient. Other courts will require an Application to Employ a professional.

The problem arises from the fact that while the power to sell is specifically given to Chapter 13 debtors – for Section 363 provisions that speak in terms “trustees” – there is no similar power given to Chapter 13 debtors to hire professionals, like real estate brokers or an auctioneer. See, Section 327(a).

In fact, in setting up conflict rules for professionals, Section 327(c) lists Chapters 7, 12 and 11, but not Chapter 13. Whatever that means.

On the other hand, some courts have assumed that the Chapter 13 debtor should hire professionals in the same way it is normally done in bankruptcy cases. “It is true, as the Trustee contends, that Debtors have not filed an application for employment of a realtor to sell their interests in real property, which weighs against them.” In re Mastel, 2010 Bankr. LEXIS 164 at *15, 2010 WL 234971 at *17 (Bankr. D. Mont. Jan. 15, 2010).

I. Is the secured creditor(s) going to be allowed to credit bid?

“Credit bidding” is where the secured creditor's bid is actually an offset to its secured claim. So, for example, if a house had a $50,000 mortgage on it, and the mortgage holder credit bid $30,000, the credit would get the house for an offset of the $30,000 against the $50,000 owed.

If the sale is with reserve, and the reserve is higher than the amount of the secured debt – allowing credit bidding makes no difference. Where liens may not be fully satisfied, it may have an effect. In particular, a winning “credit bid” raises the question: where does the money come from to pay the auctioneer and the costs of sale?

It should be noted that “credit bidding” is a hot topic in the Chapter 11 world. The United States Supreme Court has accepted certiorari in RadLAX Gateway Hotel LLC v. Amalgamated Bank, U.S., No. 11-166, to decide whether Chapter 11 plans can be confirmed that prohibit credit bidding. There is currently a split among the circuits. Obviously, the Supreme Court's decision in the RadLAX Chapter 11 may impact credit bidding in the Chapter 13 context.

J. The Bankruptcy Code Section on remedies in the event of collusive bidding.

Section 363(n) provides remedies for collusive bidding. A sale can be avoided by a trustee when the price was controlled by an agreement among the bidders. Alternatively, the trustee may recover from a party to such agreement any excess of value over the purchase price. What must be shown is an intent to control the sale price, not just an agreement that has some effect on the sale price. See, 3 Collier on Bankruptcy ¶363.12 at 363-89 (16th ed. 2010).

The trustee may recover attorney's fees, costs and expenses, and under some circumstances, punitive damages. See, 3 Collier on Bankruptcy ¶363.12 at 363-89 (16th ed. 2010).

Note that Section 1303 says that the “debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l)” – NOT Section

363(n), which specifically uses the term “trustee”. This could require a Chapter 13 trustee to at least join with the debtor in pursuing remedies against collusive bidders.

K. DO NOT include Plan provisions requiring a Chapter 13 trustee to sell assets.

The court in See, In re Mastel, 2010 Bankr. LEXIS 164 at *15, 2010 WL 234971 at *5-*6 (Bankr. D. Mont. Jan. 15, 2010) stated that: “Debtors' Plan has a "drop dead" provision in paragraphs 1 and 2(b), which allows the Court to allow the Chapter 13 Trustee to liquidate the Debtors' real estate through a court approved process, or else convert the case to Chapter 7 or dismiss the case if the Debtors' property does not sell before April 30, 2011.”

Don't be that guy.

You do not want to put a provision requiring the Chapter 13 trustee to liquidate the debtors' real estate. A Chapter 13 trustee's objection to the Plan is substantially increased by such a provision.

Chapter 13 trustees are not set up for selling assets like Chapter 7 trustees are. Sale of an asset is a potential taxable event. One example of the difference is the tax identification number. When an asset Chapter 7 estate is opened, the estate gets its own tax identification number. That way, when the property sells, and there are taxes to be paid on the sale, like capital gains taxes, those can be paid by the Chapter 7 estate. Chapter 13 trustees often have their

own tax identification numbers – but they are for the entire office, not by case. This creates huge headaches for a Chapter 13 trustee, and the case, in trying to deal with the tax issues that can arise from an asset sale.

Moreover, as discussed in more detail above, the power to sell property is given to the debtor in Chapter 13. And left out of the powers and duties of a Chapter 13 trustee is any requirement to liquidate property. See, §1302(b)(1), listing specific subsections of §704(a) that apply to Chapter 13 trustees, but not including §704(a)(1): "collect and reduce to money the property of the estate for which such trustee serves, . . ."

RULE 6004. USE, SALE, OR LEASE OF PROPERTY

(a) Notice of Proposed Use, Sale, or Lease of Property. Notice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with §363(b)(2) of the Code.

(b) Objection to Proposal. Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than seven days before the date set for the proposed action or within the time fixed by the court. An objection to the proposed use, sale, or lease of property is governed by Rule 9014.

(c) Sale Free and Clear of Liens and Other Interests. A motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. The notice required by subdivision (a) of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served on the debtor in possession or trustee.

(d) Sale of Property Under $2,500. Notwithstanding subdivision (a) of this rule, when all of the nonexempt property of the estate has an aggregate gross value less than $2,500, it shall be sufficient to give a general notice of intent to sell such property other than in the ordinary course of business to all creditors, indenture trustees, committees appointed or elected pursuant to the Code, the United States trustee and other persons as the court may direct. An objection to any such sale may be filed and served by a party in interest within 14 days of the mailing of the notice, or within the time fixed by the court. An objection is governed by Rule 9014.

(e) Hearing. If a timely objection is made pursuant to subdivision (b) or (d) of this rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.

(f) Conduct of Sale Not in the Ordinary Course of Business.

(1) Public or Private Sale. All sales not in the ordinary course of business may be by private sale or by public auction. Unless it is

impracticable, an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk shall be filed on completion of a sale. If the property is sold by an auctioneer, the auctioneer shall file the statement, transmit a copy thereof to the United States trustee, and furnish a copy to the trustee, debtor in possession, or chapter 13 debtor. If the property is not sold by an auctioneer, the trustee, debtor in possession, or chapter 13 debtor shall file the statement and transmit a copy thereof to the United States trustee.

(2) Execution of Instruments. After a sale in accordance with this rule the debtor, the trustee, or debtor in possession, as the case may be, shall execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser.

11 USC § 363 - USE, SALE, OR LEASE OF PROPERTY

* * * * * * * * * *

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) ofsection 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the

notification required under such subsection (a), unless such waiting period is extended—

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(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

* * * * * * * * * * (e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

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

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

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

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

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(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) 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.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or

may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

§2-328. Sale by Auction.

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good

faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

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