Mortgagees Beware: Proceed Promptly with Care or Find your Lien is Impaired

by
Kathleen E. Kraft[1]
Thompson Coburn LLP
www.thompsoncoburn.com

Legal Description Error: Advantage Subsequent Tax Lienor

On June 30, 2008, the U.S. Bankruptcy Appellate Panel for the Eighth Circuit held that an incorrect legal description in a mortgage rendered the mortgage avoidable under 11 U.S.C. § 544 and gave priority to subsequently filed IRS tax liens on the property. Ameriquest Mortgage Co. v. Stradtmann (In re Stradtmann), B.A.P. 8th Cir., No. 07-6056 (June 30, 2008).

In May of 2004, Ameriquest took a mortgage on the Debtors' homestead to secure a $183,000 promissory note. The mortgage correctly stated the property's common address, but contained a legal description for an entirely different piece of property. Ameriquest recorded the mortgage with the incorrect legal description on May 20, 2004. Subsequently, the IRS filed three notices of tax lien against the Debtors' property.

Approximately one year after granting the mortgage to Ameriquest, the Debtors filed for Chapter 7 bankruptcy. Ameriquest moved for relief from the automatic stay to reform the mortgage to correct the legal description of the property. The bankruptcy court granted Ameriquest relief from the stay to reform the mortgage in state court. The Chapter 7 trustee removed the action and filed a counterclaim seeking to avoid the defective mortgage under 11 U.S.C. § 544(a)(3). The bankruptcy court ruled that the mortgage "was avoidable under § 544; that the interest avoided was preserved for the benefit of the estate, to be administered by the Trustee; and that the I.R.S's tax liens were superior to the interests of the Trustee." Ameriquest appealed the bankruptcy court's decision to the U.S. Bankruptcy Appellate Panel for the Eighth Circuit (the "Eighth Circuit B.A.P." or "Panel").

The Eighth Circuit B.A.P. affirmed the decision of the bankruptcy court, finding that the Chapter 7 trustee, standing in the shoes of a bona fide purchaser under Minnesota law, could avoid the conveyance to Ameriquest because the defective mortgage failed to provide either constructive or implied notice of Ameriquest's interest in the Debtors' property. Ameriquest argued that the defect in the mortgage was apparent, and thus the mortgage gave constructive notice of Ameriquest's interest, because the legal description conflicted with the common address and the tax identification number listed on the mortgage. Relying on Lindquist v. Household Industrial Finance Co. (In re Vondall), a case affirmed by the Eighth Circuit Court of Appeals in June 2008, the Panel rejected Ameriquest's argument. The Eighth Circuit B.A.P. found that, under Vondall, "a conflict between a tax identification number and a legal description is not considered apparent…If there is northing in the property description to trigger a duty of further

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[1] KATHLEEN E. KRAFT is an associate with Thompson Coburn LLP, 1909 K Street N.W., Suite 600, Washington, D.C. 20006, where she concentrates her practice in the areas of business bankruptcy, corporate restructuring and creditors' rights. Ms. Kraft graduated *magna cum laude* from Saint Louis University with an honors Bachelor of Arts degree in English. She received her J.D., *magna cum laude*, from Saint Louis University School of Law. Ms. Kraft is admitted to practice in Missouri and Illinois, and has admission to practice pending in the District of Columbia. She is a member of the American Bar Association and the American Bankruptcy Institute. She can be reached at kkraft@thompsoncoburn.com; .202.585.6922 (ph) or 202.508.1035 (fx)

inquiry, then a conflict between the legal description and the common address is not apparent, and therefore does not trigger constructive or implied notice."

A Preference for Procrastination: Late-Perfecting Lender's Lien Avoided as a Preference

On June 26, 2008, the U.S. Court of Appeals for the Sixth Circuit held that a late-perfected mortgage lien was avoidable as a preferential transfer and that the earmarking doctrine did not shield the lender from preference exposure. Chase Manhattan Mortgage Corp. v. Shapiro (In re Lee), 6th Cir., No. 06-1538 (June 26, 2008).

In 2001, the Debtor purchased a piece of property in Pontiac, Michigan and obtained a 30-year mortgage from Flagstar Bank. The Flagstar mortgage was properly recorded with the Oakland County Recorder of Deeds. Later in 2001, Flagstar assigned the mortgage and related note to Federal National Mortgage Association, in care of Chase Mortgage Company. Chase Mortgage Company later merged with Chase Manhattan Mortgage Corporation ("Chase"). In October 2003, the Debtor refinanced the original loan by obtaining a new mortgage loan from Chase, using the proceeds of the new loan to pay off the original loan. In connection with the refinancing, Chase obtained a new 30-year mortgage on the property. Chase discharged the original mortgage by a "Discharge of Mortgage" dated October 27, 2003. The Discharge of Mortgage was recorded on January 16, 2004. The new mortgage was recorded on December 17, 2003—51 days after the original mortgage was discharged and 72 days after the closing on the new loan.

On March 4, 2004, 77 days after Chase recorded the new mortgage, the Debtor filed for bankruptcy protection. The trustee sought to avoid the new mortgage as a preferential transfer under 11 U.S.C. § 547(b). The bankruptcy court found that the new mortgage could be avoided as a preference because the perfection of the new mortgage did not relate back to the initial transfer under § 547(e)(2)(B) and the recording of the new mortgage caused a diminution of the Debtor's estate. The bankruptcy court also rejected Chase's argument that the earmarking doctrine protected the transaction, finding that the doctrine only protected the first transfer (the transfer of the funds). After the district court reversed the bankruptcy court, the trustee appealed the case to the Sixth Circuit Court of Appeals.

The Sixth Circuit Court of Appeals (the "Court") found that the earmarking doctrine did not apply to protect Chase from preference liability. As stated by the Court, the earmarking doctrine applies where "(a) the agreement is between a new creditor and the debtor for the payment of a specific antecedent debt; (b) the agreement is performed according to its terms; and (c) the transaction according to the agreement does not result in a diminution of the debtor's estate." The Court found that Chase could not rely on the earmarking doctrine to protect the transfer of the new mortgage because (1) Chase was not a "new creditor," in that Chase refinanced its own loan; (2) the two transfers made by the Debtor in the refinancing transaction cannot be treated as one for purposes of applying the defense in direct contradiction to the meaning of "transfer" in §§ 101(54) and 547(e); (3) the doctrine cannot be applied to the transfer of a lien interest, as opposed to a transfer of funds, because the grant of a lien does not involve a transfer of "earmarked" property; (4) the transfer caused a diminution in the Debtor's estate because Chase did not hold a perfected security interest from the time the original mortgage was discharged to the time the new mortgage was recorded, and the subsequent perfection of the new mortgage encumbered non-exempt equity in the property that would have been available for payment to the Debtor's unsecured creditors; and (5) allowing Chase to avoid preference liability under the earmarking doctrine would "essentially write § 547(e) out of the Bankruptcy Code" and defeat the discouragement of secret liens.

The Court also rejected Chase's argument that "it would be unfair and against public policy [to impose preference liability] because the refinancing transaction involved a mere substitution of its New Mortgage for the Original Mortgage and ultimately benefitted the Debtor's other creditors, not Chase." The Court stated that although the result in the case may be harsh, Chase could have readily prevented such result by timely perfecting its security interest.

Caveat Emptor for Alabama Real Estate Buyers: Tax Withholding Obligations Now Exist

by
Riley W. Roby and Walter H.C. McKay
Balch & Bingham LLP
www.balch.com

Beginning August 1, 2008, buyers, transferees and closing agents involved in Alabama real estate transactions must be mindful of new obligations to withhold and remit to the Alabama Department of Revenue (***"ADOR"***) a percentage of the purchase price otherwise payable to a nonresident of Alabama that sells or transfers Alabama real estate. With the recent passage of Act 2008-504 (the ***"Act"***), Alabama sails a similar course charted by numerous other states imposing tax withholding obligations on parties to real estate transactions.[1]

Summary of Alabama Tax Withholding Act

The Act applies to a sale of Alabama real estate by a seller that is a nonresident of Alabama. The Act and related forms[2] published by ADOR permit a seller that is a nonresident of Alabama to establish (for purposes of withholding obligations) Alabama residency by affirming to the buyer by sworn affidavit that the seller is an Alabama resident or the seller satisfies each of the following four conditions:

1. Seller has filed Alabama income tax returns for the 2 prior tax years; **and**

2. Seller is presently in business in Alabama and will continue substantially the same business after the sale ***or*** Seller has other real property in Alabama at the time of closing of equal or greater value than the withholding tax liability as measured by 100% of the tax assessed value; **and**

3. Seller will report the subject sale on an Alabama income tax return for the year of sale and file the Alabama income tax return by the due date with any applicable extensions; **and**

4. If Seller is a corporation or limited partnership, Seller is registered to do business in Alabama.

There are 2 basic methods for calculating the amount to be withheld by the buyer of Alabama real estate from a nonresident of Alabama. Under the first method, an individual buyer

[1] See California (Cal. Rev. & Tax. Code Sec. 18662 (West 2008)); Colorado (Colo. Rev. Stat. Sec. 39-22-604.5 (2007)); Georgia (Ga. Code Ann. Sec. 48-7-128 (West 2008)); Hawaii (Haw. Rev. Stat. Sec. 235-68 (West 2007)); Maine (Me. Rev. Stat. Ann. tit. 36, Sec. 5250-A (1995)); Maryland (Md. Code Regs. 03.04.12.01 (2008)); Mississippi (Miss. Code Ann. Sec. 27-7-308 (1972)); New Jersey (N.J. Stat. Ann. Sec. 54A:8-9 (2005)); New York (N.Y. Tax Law Sec. 663 (2004)); Oregon (See 2008 Or. Law 1st Sp. Sess. Ch. 54(S.B. 1101)); Rhode Island (R.I. Gen. Laws Sec. 44-30-71); South Carolina (S.C. Code Ann. Sec. 12-8-580 (2007)); and Vermont (Vt. Stat. Ann. tit. 32, Sec. 5847 (1997)), all of which impose laws similar to the Act.

[2] It is important to note that these recently promulgated forms are not ADOR regulations. Although it is anticipated that ADOR will issue formal regulations to interpret certain provisions of the Act, there have been no official regulations promulgated by ADOR at this time.

must withhold 3% of the purchase price, while a corporation, partnership or unincorporated association or other entity buyer (such as an LLC) must withhold 4% of the purchase price. Under the second method, an Alabama nonresident seller may affirm to the buyer by sworn affidavit the amount of gain recognized by the seller on the transaction, and the applicable withholding rate would then apply only to the gain amount. Under either calculation method, the buyer (a) must file the required tax return and remit the applicable withholding amount to ADOR by the last day of the calendar month following the month that the Alabama real estate transaction closed, and (b) shall not withhold and remit an amount greater than the net proceeds payable to the seller from the real estate transaction.

Noteworthy Alabama Tax Withholding Act Issues for Practitioners

The Act creates a number of unresolved issues which transaction parties must handle in connection with a closing. Although not comprehensive, the following discussion highlights issues implicated by the Act that are of particular importance to real estate practitioners:

1. *Tax-Free Exchanges*: Transferors of property often engage in tax-free exchanges under IRC Section 1031 in order to defer taxable gain which would otherwise be recognizable. Although the Act does not expressly exempt tax-free exchanges from the withholding obligations, ADOR has recently issued certain Frequently Asked Questions [Concerning] Withholding on Sales/Transfers of Real Property and Associated Tangible Personal Property by Nonresidents (Act 2008-504) (the ***"FAQs"***), which state that "[w]ithholding is not required to the extent that the income from the sale is not subject to Alabama income tax." Because income from a 1031 transaction is not subject to Alabama income tax, the FAQs suggest that the withholding obligations do not apply in a 1031 transaction. However, because the FAQs are provided by ADOR as guidance in advance of regulations, it is anticipated that such regulations or perhaps even a statutory amendment will specifically address this issue.

2. *Single Asset Entities*: For numerous planning reasons, real estate is often titled in an entity whose sole asset is that single piece of real estate. If a non-resident[3] single asset entity (i.e., one that is neither organized under Alabama law nor maintains it principal place of business in Alabama) sells its real estate, then the buyer will be required to withhold the applicable percentage of the purchase price from the sales proceeds. Such a seller would fail the second prong of the 4-prong Alabama residency test because it would not likely substantially continue the same business after the closing or own any other Alabama real estate at the time of the closing. In certain circumstances, Alabama composite tax return filers are exempt from the Act's withholding requirements, which may assist certain non-resident transaction parties. The disparity created by ADOR's favoring residents over non-residents under these circumstances may be subject to attack as violative of the Commerce Clause of the U.S. Constitution.

3. *Liability For Act Compliance*: The parties involved in a modern commercial real estate closing rarely are all in the same room to close the transaction. Indeed, a typical commercial closing involves representatives of the seller and buyer overnighting closing documents with an escrow instruction letter to a settlement agent, who is charged with handling the receipts and disbursements involved in the transaction and charged with drafting a closing statement to accurately reflect those receipts and disbursements. Although the Act solely imposes

[3]The recently published ADOR instructions for the Alabama residency affidavit under the Act exempt Alabama residents, including individuals and business entities either organized under Alabama law or with their principal place of business in Alabama, from the Act's withholding requirements.

liability on the buyer relating to violations of its provisions, a settlement agent involved in a transaction with parties represented by out-of-state counsel should nevertheless be proactive in disclosing the Act's provisions to the parties. Such disclosure should likely involve having the transaction parties execute a written acknowledgment describing the Act's terms, which might also include a provision whereby the parties indemnify the settlement agent for any potential exposure it may incur under the Act. ADOR should consider issuing future written guidance to explicitly limit a settlement agent's exposure under the Act to alleviate these concerns.

4. *Purchase Price Thresholds*: Practitioners should be mindful that ADOR has provided written guidance concerning certain purchase price thresholds, affording an additional exemption from the Act's withholding requirements. Issued in connection with the FAQs, this exemption applies to any transaction with a purchase price less than $800,000 which closes after August 1, 2008 but prior to January 1, 2009, and any transaction with a purchase price less than $300,000 which closes after December 31, 2008.

Where to Find More Information About the Alabama Tax Withholding Act

The FAQs are available for review in full at ADOR's website at www.revenue.alabama.gov/incometax/nonresidentwh.htm, together with the following forms promulgated by ADOR which are intended to facilitate compliance with the Act: (i) Form NR-AF1 (Affidavit of Seller's Residence); (ii) Form NR-AF2 (Affidavit of Seller's Gain); (iii) Form NR-AF3 (Seller's Certificate of Exemption); and (iv) Form WNR-V (withholding on Sales or Transfers of Real Property and Associated Tangible Personal Property by Nonresidents Payment Voucher). Copies of each of these four forms follow this article.

Clear Channel Outdoor, Inc.
v.
Nancy Knupfer, Chapter 11 Trustee; DB Burbank, LLC

By John Matthew Trott and Erik M. North

There are two ways of selling assets in a bankruptcy case: (1) pursuant to a confirmed plan of reorganization; or (2) pursuant to § 363 of Title 11 of the U.S. Code (the "Bankruptcy Code"). In recent years, more and more cases are being resolved by the sale of assets pursuant to Bankruptcy Code § 363 for a number of reasons, including that (i) a § 363 sale can be done far more quickly than confirming a plan of reorganization, (ii) until the recent *Clear Channel* case, it was clear that a sale under Bankruptcy Code § 363 was free and clear of all liens, claims and encumbrances and (iii) until the *Clear Channel* case, it was clear that unless a stay pending appeal is obtained, appeals of § 363 sales are generally going to be moot pursuant to Bankruptcy Code § 363(m).

The recent 9th Circuit Bankruptcy Appellate Panel ("BAP") decision in *Clear Channel Outdoor, Inc. v. Nancy Knupfer, Chapter 11 Trustee; DB Burbank, LLC* (2008 WL 2840659 (9th Cir. BAP (Cal.)) casts doubt on two of the above reasons for conducting a § 363 sale. The BAP held that even though no stay pending appeal had been obtained, the appeal from a § 363 sale was not moot. The BAP also found that the sale was not, in fact, free and clear of all liens, claims and encumbrances.

The Facts

PW, LLC ("PW"), a single-asset real estate entity holding several contiguous parcels of land in Burbank, California (the "Property"), had obtained the necessary entitlements pursuant to a development agreement with the City of Burbank to develop a mixed-use complex of luxury condominiums and retail space. Due to "problems large and small," the project did not progress as planned and, in July 2006, DB Burbank, LLC ("DB"), the holder of a claim for over $40 million secured by a first-priority lien on the Property, initiated foreclosure proceedings. On November 20, 2006, just prior to foreclosure, PW filed a chapter 11 bankruptcy case. DB immediately moved for, and the bankruptcy court granted, the appointment of the trustee, Nancy Knupfer ("Trustee").

Facing several immediate problems, including implementing the development agreement for the Property, the Trustee proposed to sell the Property and entered into negotiations with DB to accomplish the sale. These negotiations resulted in a "binding term sheet" between DB and the Trustee, establishing detailed procedures for an auction and sale of all of PW's assets, including the Property. The term sheet provided that DB would serve as a stalking horse bidder for the Property. If there were no qualified overbidders, DB would buy the Property for a credit bid of approximately $41.4 million. As a condition to the proposed sale, DB agreed to pay the Trustee a "Carve-Out Amount" of up to $800,000 to be used for certain administrative fees and other expenses, and not to seek relief from the automatic stay.

The Trustee filed a motion to approve the sale of the Property free and clear of all liens, claims and encumbrances under § 363(f)(3) and (f)(5) of the Bankruptcy Code. The

Property was encumbered by a junior lien in favor of Clear Channel Outdoor, Inc. ("Clear Channel"), securing a claim of approximately $2.5 million. Clear Channel opposed the motion, asserting that § 363(f) of the Code (*see below for text of § 363(f)*), was not applicable. Over Clear Channel's objection, the bankruptcy court entered an order authorizing the sale free and clear of Clear Channel's lien.

There were no qualified overbidders and on May 31, 2007, the bankruptcy court entered an order approving the sale and finding that DB was a purchaser in good faith. Clear Channel received no proceeds from the sale of the Property and timely filed an appeal of the order. The bankruptcy court declined to stay its order pending Clear Channel's appeal.

Mootness of Clear Channel's Appeal

The BAP noted that there were three types of mootness that might apply to the sale: constitutional, equitable and statutory. Constitutional mootness arises from the constitutional limitations on the federal courts to adjudicate only live cases and controversies. A appeal is constitutionally moot if it is impossible to grant relief. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992). The BAP concluded that the appeal was not constitutionally moot. Even though the sale was completed, the court could still fashion some relief, such as reversing the sale or reversing the stripping of Clear Channel's lien.

The doctrine of equitable mootness applies when: (1) the appellant has failed to obtain a stay; and (2) even though relief on appeal is possible, the transactions that have taken place in the absence of a stay are too complex and difficult to unwind. The BAP agreed with DB and the Trustee that the doctrine of equitable mootness applied to the sale of the Property to DB. Citing *In re Popp*, 323 B.R. at 271, the BAP stated that "[e]quitable mootness requires the court to look beyond impossibility of a remedy to 'the consequences of the remedy and the number of third parties who have changed their position in reliance on the order that is being appealed'." The BAP noted that "[u]ltimately, the decision whether to unscramble the eggs turns on what is practical and equitable," *Baker & Drake, Inc. v. Pub. Serv. Comm'n (In re Banker & Drake, Inc.)*, 35 F.3d 1348, 1352 (9th Cir. 1994). The BAP concluded that based on the actions taken by DB and the reliance on such actions by third parties, the transaction under consideration was too "complex and difficult to unwind" and declined to reverse the bankruptcy court's order approving the sale.

That was a pyrrhic victory for DB, however, since the BAP did not find Clear Channel's appeal as to the stripping of its lien moot. Finding that (a) the issues before the BAP regarding the sale of the Property free and clear of all liens, which resulted in the stripping of Clear Channel's junior lien, were not complex, and (b) the reversal of this aspect of the bankruptcy court's order did not negatively impact third parties, the BAP held that this aspect of the appeal was not equitably moot.

The BAP then analyzed whether Clear Channel's appeal of the stripping of its lien was statutorily moot under § 363(m).

Section 363(m) protects sales of bankruptcy estate property, stating:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of [§ 363] of a sale or lease of property does not affect the validity of the 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.

Since Clear Channel did not obtain a stay pending its appeal of the court's order, DP and the Trustee asserted that the BAP was prevented from reversing the bankruptcy court's order that the Property be sold free and clear of all liens. The BAP disagreed, and, applying an exceptionally literal reading of the statute, noted that § 363(m) on its face only applies to subsections (b) and (c) of § 363. Since the lien-stripping was ordered under § 363(f), the BAP held that the § 363(m) protection did not apply.

The BAP also noted that the language of § 363(f) refers to authorizations to "use, sell or lease . . . property of the estate," while § 363(b) only limits the ability to "affect the validity of a *sale* or *lease* under such authorization . . . ." The BAP reasoned that by omitting "use" along side "sale and lease" in § 363(m), Congress only intended to extend such protection to "changes of title or other essential attributes of a sale, together with the changes of authorized possession that occur with leases." Accordingly, the BAP held that while § 363(m) protects the actual sales from appellate review, the terms of such sales, specifically, in this case, lien-stripping, are not afforded such statutory protection.

Lien-Stripping under § 363(f) of the Bankruptcy Code

The BAP's analysis of the bankruptcy court's stripping Clear Channel of its junior lien centered on § 363(f), which states:

> (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:
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> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
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> (2) such entity consents;
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> (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;
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> (4) such interest is in bona fide dispute; or
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> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction or such interest.

The BAP restricted its analysis to subsections (3) and (5), finding that subsections (1), (2) and (4) were inapplicable to the facts of the case (i.e., (1) applicable California law would preserve Clear Channel's lien in the event the Property was sold, (2) Clear Channel did not consent to the transfer free and clear of its lien, and (4) Clear Channel's lien was not in dispute).

The question was whether subsection (3) of § 363(f) allowed a sale free and clear of all liens, claims and encumbrances when the Property sold for less than the total amount of the claims that it secured. The answer to this question turned on the phrase "aggregate value of all liens."

DB and the Trustee asserted that the phrase "aggregate value of all liens" meant the economic value of the liens, not their face value. The BAP disagreed, finding that in the context of the Code, "aggregate value of all liens" as it appears in § 363(f)(3) does not mean "the *economic* value of such liens, rather than their face value" (i.e., the value of the secured claims).

The BAP further reasoned that because subsection (3) permits a free and clear sale only when "the price at which such property is to be sold is *greater* than the aggregate value of all liens," "the paragraph could *never* be used to authorize a sale free and clear…when the claims exceed the value of the collateral that secures them," because '[I]n any case in which the value of the property being sold is less than the total amount of clams held by secured creditors, the total of all allowed secured claims will *equal*, not exceed, the sale price [of the property], and [§ 363(f)(3)] requires the price to be "greater than" the "value of all liens.'" Therefore, the BAP held that "§ 363(f)(3) does not authorize the sale free and clear of a lienholder's interest if the price of the estate property is equal to or less than the aggregate amount of all claims held by creditors who hold a lien or security interest in the property being sold."

The BAP then turned to § 363(f)(5), which was the basis of the bankruptcy court's order. The BAP determined that § 363(f)(5) did not support stripping Clear Channel's lien from the Property.

In an effort to avoid § 363(f)(5), Clear Channel argued that it's lien was not an interest. The BAP was not swayed by this argument and determined that Clear Channel's lien was an "interest" (a term not defined in the Code) for the purposes of § 363(f)(5). The BAP then addressed whether Clear Channel "could be compelled…to accept a money satisfaction" of such interest.

The bankruptcy court had found that § 363(f)(5) is satisfied whenever a claim or interest can be satisfied with money. The BAP found this analysis too simplistic. The BAP noted that this analysis would, in essence, subsume § 363(f)(3) since payment of money would satisfy most claims and interests.

In order not to have § 363(f)(5) subsume § 363(f)(3), the BAP assumed for its analysis that § 363(f)(5) referred to "a legal and equitable proceeding in which the nondebtor could be compelled to take *less* than the value of the claim secured by the interest," (i.e., "the existence of another legal mechanism by which a lien could be extinguished without full satisfaction of the secured debt."). The BAP stated that this narrow interpretation prevented an overlap with § 363(f)(3), but nonetheless preserved a role for § 363(f)(5) in such circumstances as buy-out arrangements among partners or joint venturers or in cases where liquidated damages could be used as a remedy in place of specific performance. Accordingly, the BAP held that a "bankruptcy court must make a finding of the existence of such a mechanism and the trustee must demonstrate how satisfaction of the lien 'could be compelled'."

Finally, in clarifying its finding that there must be at least the possibility of an applicable proceeding at law or equity "in which a nondebtor could be forced to accept money in satisfaction of its interest," the BAP held that a cramdown under § 1129(b)(2) of the Code is not an applicable procedure for the purpose of § 363(f)(5). The BAP reasoned that if the cramdown proceeding were sufficient in and of itself, there would have been no Congressional purpose in including § 363(f)(5) in the Code.

Having decided that Clear Channel's appeal to reverse the bankruptcy court's stripping of its junior lien was neither equitably nor statutorily moot and that the bankruptcy court did not apply the correct legal standard under § 363(f)(5) in ordering the Property's sale free and clear of all liens, the BAP reversed the lien-stripping part of the bankruptcy court's order and remanded the case, providing the parties the opportunity to identify provisions of state law, if any, that would allow for the sale of the Property free and clear of Clear Channel's lien.

While the *Clear Channel* case has yet to be published, it nonetheless casts a shadow across chapter 11 cases in which extinguishing existing liens on estate property is an important component of the economics of the sale. The result in *Clear Channel* is that DB ended up owning the Property subject to the $2.5 million lien in favor of Clear Channel. Obviously, this is not the result DB desired, nor would this have been the result had DB foreclosed under its first-priority lien.

By severely limiting the protection provided to good faith buyers under § 363(m), the BAP's holding may cause potential purchasers of chapter 11 properties to think twice before engaging in a § 363(f) transaction in cases where a lien holder could rise from the dead even after such a sale is completed.

John Matthew Trott is a partner and Erik M. North is an associate in the Los Angeles office of Cox, Castle & Nicholson LLP, where they represent parties in commercial real estate transactions.