Five Issues in Bankruptcy with Which a Real Estate Attorney Should Be Familiar

By Thomas A. Glatthaar

Having worked as a title attorney for many, many years now, I have seen my share of bad real estate markets. I started in the business in 1981, and those of you who were around in those days remember that things were bad then. I worked my way through the steep but short recession of 1990-91 and the little downturn in 1999-2000, and have had the pleasure of participating in the Great Recession and its aftermath. I would like to think that I have learned a lot from these experiences, but if there is one thing I have learned from these experiences it is this: there is a connection between bankruptcy and real property law, and it is helpful when practicing one to have at least a working understanding of how the other one affects what you do.

Coming fresh off of several recent title matters where the owner was in bankruptcy and where I had to wade, once again, into the bankruptcy waters, I thought it a good opportunity to visit on five situations that commonly arise in a bankruptcy context with the hope of giving a basic explanation of how these play out. I tried to hit on situations where, in my experience, the bankruptcy lawyers and the title lawyers seem to speak different languages, hoping, perhaps, to bridge a gap or two. The issues, and my discussion of each of them, are set forth below.

Is My Transaction in Bankruptcy (Sale or Mortgage) Exempt from Transfer Tax or Mortgage Tax?

The bankruptcy code contains a provision at 11 U.S.C. Section 1146(a) that exempts "the issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title" from "a stamp or similar tax." Courts have defined a "stamp or similar tax" as a tax having all or most of the following characteristics:

1. the amount of tax is determined by the consideration recited in the document;
2. the taxes must be paid as a prerequisite to recording the document;
3. the use of a stamp or other device to conveniently provide for clear and visible evidence of payment;
4. the tax relates to a written document;
5. the written documents to which the tax relates are recognized in law as important evidence of the enforcement of legal rights.[1]

Under that criteria, the New York State Real Estate Transfer Tax (the "NYSRETT"), the New York City Real Property Transfer Tax (the "NYCRPTT") and the New York Mortgage Recording Tax (the "Mortgage Tax") have all been viewed as stamp or similar taxes;[2] the now-repealed Tax on Gains Derived from Certain Real Property Transfers (New York Tax Law Article 31-B) was not.[3]

In addition, in order to assert this exemption the transfer must be made pursuant to a confirmed plan of reorganization under 11 U.S.C. Section 1129. The requirement that the transfer be a transfer under a plan does not mean that the transfer be mentioned or authorized under the plan of reorganization,[4] but it does require that the transfer be one over which the bankruptcy court has jurisdiction. Accordingly, a mortgage that was executed and recorded by a purchaser from a debtor, the proceeds of which were used to fund that purchase, was not exempt under 11 U.S.C. Section 1146(a) since the mortgage was arguably an event over which the court lacked jurisdiction and since bankruptcy courts generally lack jurisdiction to determine the tax liability of a non-debtor.[5]

Provisions contained in the statutes imposing the NYSRETT, NYCRPTT and the Mortgage Tax, or the regulations promulgated pursuant thereto, all reinforce or even expand the exemption in 11 U.S.C. Section 1146(a). Pursuant to Section 1405(b)(8) of the New York Tax Law, conveyances made "pursuant to the federal bankruptcy act" are exempt from New York State Real Estate Transfer Tax.[6] This exemption applies whether the bankruptcy is a Chapter 7, 11 or 13, or whether or not the conveyance is made pursuant to a confirmed plan.[7] The regulations relating to the Mortgage Tax affirm but do not expand on the 1146(a) exemption.

There is no exemption contained in the NYCRPTT, or in the regulations promulgated thereunder. In the past, the New York City Department of Finance had expressed a willingness to allow deeds executed and delivered pursuant to a bankruptcy court order to sell under 11 U.S.C. Section 363 to be recorded without payment of the NYCRPTT before the confirmation of a plan provided that (i) the bankruptcy was a Chapter 11 proceeding,[8] (ii) the bankruptcy court order approving the sale exempted the transfer from NYCRPTT, (iii) the bankrupt agreed to promptly cause a plan of reorganization to be confirmed, and (iv) adequate security was posted to make certain that the tax was paid should the conditions not be fulfilled. That procedure went by the wayside, however, only after the U.S. Supreme Court, in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, held that the Section 1146(a) stamp-tax exemption applies only to transfers made pursuant to a Chapter 11 plan that had been confirmed before the transfer.[9]

What Happens to Pre-Petition Ad Valorem Real Estate Taxes That Are Covered by an Order or a Plan of Reorganization That Contemplates a Sale "Free and Clear" of Liens?

As a matter of law, real estate taxes that are a lien at the time of the commencement of the bankruptcy case are a secured claim in a bankruptcy proceeding,[10] and a plan of reorganization can call for the property to be sold free and clear of the liens, which liens would attach to the proceeds. The same is true for a sale pursuant to a court order under 11 U.S.C. Section 363. Real estate taxes that are a lien due and payable after the commencement of the case, however, cannot be treated so specifically because they arise after the commencement of the case; they are either administrative expenses of the estate that are paid during the pendency of the bankruptcy proceeding,[11] or they must be paid out of the proceeds of sale. If not, the lien survives the sale of the property.

Problems arise all of the time in the context of a bankruptcy where the real estate taxes are not paid at the time of closing. In many instances, the taxing authority was not named and served in the bankruptcy (and was therefore not subject to the court's jurisdiction). Often, the tax collector will step up collection efforts after the property has been sold, and will pressure the new owner. Other times, when the post-petition taxes are paid, the payments are posted (as is the taxing authority's practice) against the oldest open liens, so that it is actually the pre-petition taxes that are paid off.

In short, this situation always seems to be a problem whenever it arises. Prudent practice dictates that special arrangements be made for dealing with the lien of pre-petition real estate taxes. These arrangements can include actually paying the taxes out of the sales proceeds with the court's approval (rather than having them paid post-closing), having the court direct special payment of the pre-petition taxes, or working out an arrangement between the parties for dealing with the prospect that the taxing authority will not discharge the lien for pre-petition taxes. Any such arrangement should be set forth in the plan of reorganization that is approved by the court or, should the sale be a Section 363 sale, in the contract that is ultimately approved by the court so that there is no question regarding the special treatment of this obligation.

What Is the Status of Liens Filed or Docketed After the Commencement of the Bankruptcy Case?

As you know, the fundamental purpose of bankruptcy law is to maximize the size of the bankruptcy estate so that it can be used to equitably pay creditors in accordance with certain rules of distribution. This purpose would be defeated if creditors of the bankrupt were concerned (rightfully) that every other creditor of the bankrupt was feverishly enforcing remedies such that at the end of the day there was nothing left to distribute. To solve this problem, the Bankruptcy Code includes an automatic stay provision[12] that arises at the commencement of the case and that bars creditors from, among other things:

1. commencing or continuing any action or proceeding against the debtor;
2. enforcing a pre-petition judgment against the debtor or its property;
3. any effort to obtain possession or control of debtor assets or property;
4. any act to create, perfect or enforce any lien against the property of the estate, whether the lien is pre-petition or post-petition.

The purpose of the automatic stay is to prevent chaotic and uncontrolled scramble for debtor's assets in a variety of uncoordinated proceedings in different courts[13] and to provide debtors with temporary respites from their creditors so that they may have the opportunity to develop and implement plans of reorganization to satisfy their creditors and, if possible, resuscitate their businesses.[14]

The Bankruptcy Code's automatic stay is extremely broad, and it needs to be to accomplish its intended purpose. However, there are some exceptions to the stay that are important to the real estate practitioner. First, the perfection of liens, the priority of which "relates back," is not stayed by 11 U.S.C. Section 362.[15] Since the New York Lien Law creates a mechanic's lien that relates back to the date that work was completed,[16] mechanic's liens on New York real property come within the safe harbor 11 U.S.C. Section 362(b)(3), and a lien that arises for work done, materials furnished or services rendered prior to the filing of a bankruptcy petition can be perfected by the lien claimant after the commencement of the case notwithstanding the automatic stay.[17] Such a lien constitutes a valid, perfected and secured lien in the bankruptcy case. Similarly, the action to continue a filed lien is also not stayed by the bankruptcy[18] whether such continuation occurs by virtue of an extension of the lien or the filing of a notice of pendency.[19]

Second, any act to perfect, maintain or continue the perfection of an interest in real property is not subject to the stay "to the extent that such act is accomplished within the period provided under" 11 U.S.C. Section 547(e)(2)(A).[20] This section of the bankruptcy code deals with the authority of a debtor-in-possession or trustee to void certain transfers of property interests made less than ninety days before the commencement of the case[21] and which otherwise meet the standard of being a "preference" as defined therein. Subsection (e)(2)(A) defines a transfer of property interests to have occurred "at the time the transfer takes effect between the transferor and transferee, if such transfer is perfected at, or within 30 days after, such time." All of this means that a transfer that

occurs prior to the commencement of the bankruptcy case can be perfected *after* the commencement of the bankruptcy case without being subject to the automatic stay provisions of 11 U.S.C. Section 362 provided that the interest is perfected within thirty days of transfer.

For example, assume that ABC LLC ("ABC") is the owner of certain real property known as Blackacre. On August 1, 2012, ABC executes and delivers a mortgage to Sunshine Bank in the amount of $100,000.00, the proceeds of which are delivered to ABC at closing. On August 8, ABC files a petition in bankruptcy, and at that time Sunshine Bank had not recorded its mortgage. Realizing its problem, Sunshine becomes aware of the bankruptcy a week later and then rushes and gets its mortgage recorded on August 23. The automatic stay provisions of 11 U.S.C. Section 362 would generally bar perfection of Sunshine's security interest after the bankruptcy filing. However, the exception described above would allow the interest to be perfected by Sunshine if it was accomplished within thirty days of the closing of the transaction. This would allow Sunshine to get a perfected, secured claim in the bankruptcy case.[22]

What Is a "363 Sale" and How Can the Sale Be Free and Clear of Existing Mortgages and Other Liens?

The bankruptcy code allows, at Section 363, a debtor to sell assets of the bankruptcy estate after the commencement of the case. That concept in and of itself is not surprising; oftentimes assets need to be liquidated in order to raise the funds needed to right the foundering business. These sales can take place without even the need for notice and a hearing where the sales are in the ordinary course of business of the debtor.[23] It would seem this power exists so that the business of the debtor can be operated "day-to-day" without the need to run into court with every move and without the risk of over-burdening the courts. However, the "ordinary course" standard turns out to be a pretty high standard to meet. The sale must be of the sort that a creditor could have reasonably foreseen as occurring at the time that credit was extended—the creditor cannot be put in a position of being subjected to unforeseen risk. Further, the sale must be the type of transaction that the debtor or its industry competitors would enter into regularly, and cannot be so large that it, by its nature, is extraordinary.[24] Accordingly, most of the Section 363 sales occur under sub-section (b), which allows sales "other than in the ordinary course of business" after notice and a hearing. Such sales, whether or not in the ordinary course of business, can be made free and clear of interests,[25] including liens, *only if* the standards set forth in Section 363(f) are met. Section 363(f) requires that one of the following apply to the proposed sale:

(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.

Any order to sell free and clear under Section 363(f) should clearly set forth which of the above standards are met to support the order. Net sale proceeds are generally turned over to the bankruptcy court or held under the court's supervision, so that it can determine the priority of claims and direct their payment. Any excess proceeds are retained by the debtor and could be used to help fund a plan, pay creditors or be used as needed (subject, obviously, to the court's jurisdiction and oversight).

The five requirements, when read together, cover a wide variety of situations and would, accordingly, allow a large number of transactions to proceed under Section 363(b) and (c). It is true that real property law rarely, if ever, allows the nonconsensual sale of property free and clear of existing liens, and requirement (1) is rarely used, especially in a real property context. A consent requirement, however, is more broadly applicable, and makes sense, especially in the context of notice and a hearing, from a policy perspective.[26] Similarly, since the proposed sales price exceeded the "value" of the aggregate amount of liens on the property (such "value" being either the face amount of the liens,[27] or more likely, the actual value of the liens as determined by the court[28]), the provision allowing for a sale free and clear where the proceeds of sale will be more than adequate to pay the claims of all lienholders makes policy sense—if a lienholder gets paid in full (or at least to the extent that the party can establish a valid lien), its consent should be a given. This requirement should cover any instance where the debtor has equity. Further, the court can act where there is an interest in the property asserted, but such interest is in bona fide dispute. The debtor's interest in the property must be substantial and the debtor must be the one disputing the interest of others,[29] but the interests can range from an ownership interest[30] to a mortgage lien[31] to a judgment creditor,[32] so long as the dispute is bona fide. As for the last requirement, it is well-established that most real property interests can be satisfied by the payment of money, and that in most instances the holder of a real property interest could be compelled to accept money in satisfaction of such an interest; it certainly covers the interests of all lienholders and secured creditors.

In addition to establishing that the proposed sale meets one of the foregoing requirements, the court must also determine that the proposed sale is in the best interests of the estate, including all creditors, secured and unsecured,[33] that the

parties are acting in good faith and at arm's length,[34] and that the procedures utilized were reasonably calculated to cause the resulting purchase price to be a fair and reasonable price for the asset, taking into account the surrounding facts and circumstances.[35] Most Section 363 orders affirmatively indicate that the court has made a finding not only as to the requirements in Section 363(f), but also the good faith of the parties, the procedures utilized for the sale were sufficient and the resulting purchase price being fair and reasonable under the circumstances regarding such sale.

There is no mandated procedure for the sale of property under Section 363(b). Such a sale can occur by private sale or by public auction.[36] One common procedure used includes finding a prospective buyer and entering into a contract with that buyer for the purchase of the real property, and then going to the bankruptcy court on motion (obviously, with notice to all interested parties) to approve the contract as well as a procedure for an auction. This motion must be made in accordance with Bankruptcy Rule 9014 and must be served on the parties who have liens or other interests in the property to be sold. Oftentimes, the contemplated procedure allows the contract vendee to get a small advantage over other prospective purchasers through the use of breakage fees payable to the contract vendee should the auction result in the sale of the property to another.[37] The bid procedure takes place under the general supervision of the court and utilizing the procedure that the court has previously approved in its Order.

Once the bid procedure is completed a determination is made as to whether any bids (should there be any) are high enough to award the property to a person other than the vendee. The court will then, on motion of the debtor served as aforesaid, issue its Section 363 order to sell free and clear. This order must find that the sale met the requirements of Section 363(f), that the procedure utilized for the sale was fair and reasonable and met the requirements of the bankruptcy rules (including those with respect to notice), that the price being paid was fair and reasonable,[38] that the proposed sale is based on the highest or otherwise best bid for the property at arm's length and in good faith, and without collusion,[39] and is in the best interests of the debtors, their estate, their creditors and other parties in interest. Such an order is stayed until 14 days after the date of entry unless the court orders otherwise.[40]

I Have Been Told That if a Bankruptcy Court Issues an Order Authorizing the Sale of Property and the Closing for That Sale Occurs Either (i) During the Appeal Period if the Stay Period Is Shortened, or (ii) in the Face of a Filed Appeal if There Is No Stay in Place, That the Sale Cannot Be Upset or Overturned on Appeal. Is This Correct?

The purpose of Bankruptcy Code Section 363(m) is to offer "finality to bankruptcy court judgments by protecting good faith purchasers, the innocent third parties who rely on finality of bankruptcy judgments in making their offers and their bids."[41] It states:

> A 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.[42]

The statute affirms that an approved sale of property under Section 363 (b) or (c) generally cannot be challenged on appeal if the sale has already been consummated in good faith without an intervening stay.[43] It derives from Article III of the Constitution, which states that courts only decide on actual controversies. The nature of the appeal is, in theory, not relevant—both jurisdictional and non-jurisdictional challenges will be barred provided that the order was not stayed at the time of the sale and the purchaser acted in good faith.[44] Knowledge of a pending appeal affects neither the validity of the same nor the finding that the purchaser was acting in good faith.[45] The presumption in favor of finality in Section 363(m) is so strong that it has been held to apply even where the bankruptcy court may have lacked subject matter jurisdiction,[46] or where the asset that is the subject of the sale order is not even part of the bankruptcy estate.[47]

A purchaser under a confirmed plan of re-organization is similarly protected by this doctrine of constitutional mootness, which is evidenced by Bankruptcy Rule 8005. So long as a purchaser is a good faith purchaser for value, the sale is protected in the same manner as is a sale under Section 363(b) or (c) provided there is no stay in place at the time of sale.[48]

There are some holes, however, in the protection that Section 363(m) or Rule 8005 affords to purchasers under these sales (and to those who take by, through or under them). Two prominent exceptions to the protections afforded to purchasers under Section 363(m) and Rule 8005 are the "good faith" exception and the "equitable mootness" exception.[49]

Any sale that is protected by Section 363(m) or Rule 8005 is only protected to the extent that the purchaser acted in "good faith," and any appeal challenging the "good faith" status of the purchaser cannot be rendered moot by a sale of the property even without a stay.[50] Though it is not mandatory to do so, courts will generally make an affirmative finding that a prospective purchaser has acted in "good faith." The concept

of good faith encompasses fair value and speaks to the overall integrity of the transaction,[51] while "bad faith" includes collusion between buyer and seller or any attempt to take unfair advantage of potential purchasers.[52] Among the circumstances held to be inadequate to find bad faith were: the fact that a purchaser was also a creditor who was an insider of the debtor, of itself, where other parties were given ample opportunity to bid and where the successful bid was for value;[53] the fact that the successful purchaser was a newly formed corporation owned and operated by debtor's former principals;[54] or where the "good faith" purchaser paid $100,000.00 for an asset valued eighteen months earlier at over $900,000.00.[55] By contrast, bad faith (or lack of good faith) could be evidenced by the parties' hiding of material facts (in this case, the existence of permanent injunctions barring certain parties from doing *exactly* what they were doing) and ulterior motives from the court,[56] or by an offer of employment to the CEO of debtor together with other facts that arose during the case (including, without limitation, efforts to chill the bidding process and the fact that the winning bidder paid insufficient value).[57]

The legal doctrine of "equitable mootness" is by its nature another hurdle for an appellant seeking to overturn a bankruptcy order to overcome. It is a prudential doctrine by which a court may dismiss a bankruptcy appeal even though effective relief could be fashioned because the granting of such relief would be inequitable.[58] It is generally (but not exclusively) applied in cases where there is a confirmed plan of reorganization. Courts will consider the following elements to determine whether to apply equitable mootness to a particular case: whether a stay was sought, whether there has been substantial consummation[59] or such a comprehensive change in circumstances that it would be inequitable for the court to exercise its jurisdiction and act.[60] The doctrine has, however, been used periodically to allow a court to intervene even in the case where a sale had occurred without an intervening stay and no finding of a lack of "good faith" on the part of the purchaser. In In re *Karta Corp.*,[61] an order confirming a plan was signed and entered on a Friday. The order waived the usual stay period under Bankruptcy Rule 6004, thereby allowing a sale to occur at any time. The following Tuesday, appellant filed a notice of appeal together with an Order to Show Cause seeking an expedited appeal. That same day, however, the property was sold. The court denied a motion by the debtor to dismiss the appeal on the grounds of equitable mootness, holding that appellant's actions were sufficient to preserve his rights on appeal, even though he failed to apply for or obtain a stay.

In conclusion, one can see the value of a real estate practitioner having a working knowledge of some of the common bankruptcy-related issues associated with the conveyancing of real property. Obviously, these issues, which run from transfer and mortgage tax to details involving certain conveyances coming through a bankruptcy, do not arise on every (or even most) transactions you will do, but one or more could impede your next real estate deal. Familiarity with these issues and the problems that they cause may help save time and money.

Endnotes

1. In re Jacoby Bender, Inc., 40 B.R. 10,13 (Bankr. E.D.N.Y. 1984), *aff'd*, 758 F.2d 840 (2d Cir. 1985); In re Amsterdam Ave. Dev. Assoc., 103 B.R. 454, 456-57 (Bankr. S.D.N.Y. 1989).
2. *Jacoby Bender*, 40 B.R. at 15; *Amsterdam*, 103 B.R. at 456-57.
3. In re 995 Fifth Ave. Assoc., L.P., 963 F.2d 503, 513 (2d Cir. 1992). The courts felt that this tax was a tax on gains and not on consideration, and accordingly, fell outside the scope of the exemption.
4. In re Jacoby Bender, 758 F.2d at 841-42; In re Smoss Enter. Corp., 54 B.R. 950, 951 (Bankr. E.D.N.Y. 1985).
5. *Amsterdam*, 103 B.R. at 460; In re Brandt-Airflex Corp., 843 F.2d 90, 92 (2d Cir. 1988).
6. This exemption also applies to the so-called mansion tax imposed by N.Y. TAX LAW § 1402-a (McKinney 2008).
7. Paul B. Coburn, N.Y. Dep't Tax & Fin. Tech. Servs. Bur. Adv. Op., TSB-A-90(9) R (Oct. 29, 1990), *available at* http://www.tax.ny.gov/pdf/advisory_opinions/multitax/a90_9r.pdf.
8. There is no similar provision exempting transfers made under Chapter 7 or Chapter 13 of the Bankruptcy Code, so there was no basis to treat transfers under these chapters as exempt.
9. Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 46-47, 52-53 (2008).
10. 11 U.S.C. § 506 (2008).
11. 11 U.S.C. § 503(b)(1)(B)(i) (2005).
12. 11 U.S.C. § 362 (2010).
13. In re Rimsat, Ltd., 98 F.3d 956, 961 (7th Cir. 1996).
14. In re 160 Bleecker St. Assocs., 156 B.R. 405, 411 (Bankr. S.D.N.Y. 1993).
15. Yobe Electric, Inc. v. Graybar Electric Co., Inc., 728 F.2d 207, 208 (3d Cir. 1984); In re Cohen, 279 B.R. 626, 635 (Bankr. N.D.N.Y. 2002).
16. N.Y. LIEN LAW §§ 17, 13(5); *see also* In re Millerlee Corp., 70 B.R. 780, 782 (Bankr. S.D.N.Y. 1987).
17. In re Chesterfield Developers, Inc., 285 F.Supp. 689, 690 (S.D.N.Y. 1968); In re C. H. Stuart, Inc., 17 B.R. 400, 405 (Bankr. W.D.N.Y. 1982).
18. In re Willax, 93 F.2d 293, 294 (2d Cir. 1937); In re Millerlee, 70 B.R. at 780.
19. In re Kodo Props., Inc., 63 B.R. 588, 590 (Bankr. E.D.N.Y. 1986).
20. 11 U.S.C. § 362(b)(3) (2010).
21. The preference period is extended to one year before the commencement of the case where the creditor is an "insider."
22. It is noteworthy to point out that although Sunshine Bank would be allowed notwithstanding the automatic stay to record its mortgage after the commencement of the case and to obtain a secured lien claim in the bankruptcy, this lien claim is still vulnerable to being voided in the case. *See* In re Planned Protective Servs., Inc., 130 B.R. 94, 98 (Bankr. C.D. Cal. 1991), where the court used the strong-arm provisions in 11 U.S.C. § 544 to void a mortgage under these facts.
23. 11 U.S.C. § 363(c)(1) (2010).
24. In re Lavigne, 183 B.R. 65, 69 (Bankr. S.D.N.Y. 1995), *aff'd*, 114 F.3d 379 (2d Cir. 1997).
25. Such "interests" includes leases and monetary liens, but does not include restrictions or easements affecting the land. FutureSource LLC v. Reuters Ltd.,

312 F.3d 281, 284 (7th Cir. 2002), *cert. denied*, 538 U.S. 962 (2003); In re Oyster Bay Cove, Ltd., 196 B.R. 251, 256 (Bankr. E.D.N.Y. 1996).

26. While there are always disputes about what constitutes "consent," it is clear that it includes a "lack of objection" by the lienholder. *FutureSource*, 312 F.3d at 281; *but see* In re DeCelis, 349 B.R. 465, 469 (Bankr. E.D. Va. 2006) (where a failure to object by a co-owner did not constitute consent).

27. *See* In re Canonigo, 276 B.R. 257, 263 (Bankr. N.D. Cal. 2002); In re Perroncello, 170 B.R. 189, 190 (Bankr. D. Mass. 1994); Clear Channel Outdoor, Inc. v. Knupfer, 391 B.R. 25, 37 (B.A.P. 9th Cir. 2008).

28. In re Beker Indus. Corp., 63 B.R. 474, 476 (Bankr. S.D.N.Y. 1986); In re Oneida Lake Dev., Inc., 114 B.R. 352, 355 (Bankr. N.D.N.Y. 1990); In re Boston Generating, LLC, 440 B.R. 302, 332 (Bankr. S.D.N.Y. 2010).

29. Missouri v. U.S. Bankr. Court for E.D. of Ark., 647 F.2d 768, 778 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).

30. *See* In re Fillion, 181 F.3d 859, 862 (7th Cir. 1999) (where the interest was a purported fee interest based on a claim for rescission of a deed).

31. *See* In re Octagon Roofing, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1981) (where debtor had shown evidence that the mortgage at issue may be voidable as a fraudulent transfer or preference).

32. *See Oneida*, 114 B.R. at 357-58 (where court held that the interest of a judgment creditor was in bona fide dispute even where debtor had not commenced any adversary proceeding against judgment creditor).

33. *See* In re Golf, L.L.C., 322 B.R. 874, 878 (Bankr. D. Neb. 2004).

34. *See* In re Wild Horse Enters., Inc., 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991).

35. *See* In re Circus Time, Inc., 5 B.R. 1, 2 (Bankr. D. Me. 1979); In re Tennessee Chem. Co., 122 B.R. 984, 984-85 (Bankr. E.D. Tenn. 1990).

36. Fed. R. Bankr. P. 6004(f)(1).

37. The breakage fees are intended to reimburse the contract vendee for costs associated with the process of due diligence and negotiation of the contract.

38. *See, e.g., Golf*, 322 B.R. at 878; *Circus Time*, 5 B.R. at 2.

39. 11 U.S.C. § 363(n) (2010).

40. Fed. R. Bankr. P. 6004(h).

41. In re Dist. 65, United Auto. Aerospace and Agric. Implement Workers of Am., UAW, 184 B.R. 196, 200 (Bankr. S.D.N.Y. 1995), *quoting* In re Stadium Mgmt., 895 F.2d 845, 847 (1st Cir. 1990).

42. 11 U.S.C. § 363(m).

43. In re Nashville Senior Living, LLC, 407 B.R. 222, 231 (B.A.P. 6th Cir. 2009).

44. In re Motors Liquidation Co., 428 B.R. 43, 54-55 (Bankr. S.D.N.Y. 2010).

45. In re Youngstown Steel Tank Co., 27 B.R. 596, 598-99 (Bankr. W.D. Pa. 1983).

46. In re Gilchrist, 891 F.2d 559, 560-61 (5th Cir. 1990).

47. In re Sax, 796 F.2d 994, 994 n.7 (7th Cir. 1986).

48. Charlton v. Ariz. Title Ins. and Trust Co., 708 F.2d 1449, 1454 (9th Cir. 1983); Vacinek-Windus v. Vacinek, 1992 WL. 450777 (W.D.N.Y. Aug. 3, 1992).

49. For a discussion of other instances that fall outside the scope of the safe harbor in 11 U.S.C. § 363(m), see "Section 363(M) Title Endorsements," by John Collen, 4 J. Bankr. L. & Prac. 531, July/August, 1995.

50. Petroleum & Franchise Funding LLC v. Bulk Petroleum Corp., 435 B.R. 589, 590 (Bankr. E.D. Wi. 2010).

51. In re 240 North Brand Partners, Ltd., 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996).

52. *Id.*; *see also* In re Perona Bros., Inc., 186 B.R. 833, 839 (Bankr. D.N.J. 1995).

53. In re Filtercorp., 163 F.3d 570, 577 (9th Cir. 1998).

54. Hower v. Molding Sys. Eng'g Corp., 445 F.3d 935, 939 (7th Cir. 2006).

55. Willemain v. Kivitz, 764 F.2d 1019, 1021 (4th Cir. 1985).

56. In re White Crane Trading Co., Inc., 170 B.R. 694, 705 (Bankr. E.D. Cal. 1994).

57. In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 148 (3d Cir. 1986).

58. In re Charter Comme'n, Inc., 691 F.3d 476, 481 (2d Cir. 2012); *see also* In re Chateaugay Corp., 94 F.3d 772, 776 (2d Cir. 1996).

59. *Charter*, 691 F.3d at 482.

60. *See Chateaugay*, 94 F.3d at 778.

61. 342 B.R. 45, 51 (Bankr. S.D.N.Y. 2006).

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