CREDIT BIDDING AFTER *FISKER*

Credit bidding has become more prevalent — and more controversial — in chapter 11 sales of collateral. Although the Supreme Court has strongly endorsed the right of a secured lender to credit bid, subsequent decisions, beginning with Fisker, *have allowed the right to be narrowed "for cause." The author reviews this history and then turns to* Fisker *and other current cases in which credit bidding has been challenged.*

By Stephen B. Selbst *

Secured creditors and their counsel took great solace from the Supreme Court's unanimous 2012 ruling in *RadLAX* that strongly affirmed the right of a secured lender to credit bid and appeared to quell the rising tide of cases that had limited or precluded that right.[1] But that relief proved short-lived when the Bankruptcy Court for the District of Delaware barred credit bidding in *In re Fisker Automotive Holdings, Inc.*, reviving the "for cause" limitation.[2] After *Fisker* was decided, creditors sought to rely on or expand its rationale, leading to renewed litigation over what constitutes cause to limit credit bidding. This article examines why credit bidding continues to be a source of controversy in chapter 11 cases. It summarizes the pre-*Fisker* case law, explains *Fisker*, and then analyzes the reported decisions in the post-*Fisker* era.

CREDIT BIDDING AND THE RISE OF THE SECTION 363 SALE

Credit bidding has become more prevalent — and a greater source of controversy — as a result of the changing nature of chapter 11. As many commentators have observed, chapter 11 cases and practice today are vastly different from the conditions that existed in 1978, when the Bankruptcy Code was enacted.[3] Among the changes, perhaps two are of greatest importance: today, secured creditors typically have liens on substantially all of a debtor's assets, giving them a greater ability to set the agenda in chapter 11 cases.[4] In addition, there is an active and liquid secondary market for all types of claims against distressed and bankrupt borrowers, including senior secured debt.[5] With that, active market, banks, or other initial lenders holding defaulted loans often sell their claims, with the result that debtors end up negotiating their restructurings with creditors whose goals and priorities may be different from their original lenders. In particular, it has been argued, these secondary lenders emphasize speed in the restructuring process for the purpose of maximizing their investment returns. That emphasis on speed has led to increased utilization of sales of all of a debtor's assets under section 363 of the Bankruptcy Code, rather than pursuing a plan of reorganization as contemplated when the Bankruptcy Code was enacted. One study analyzed a sample of approximately 500 recent chapter 11 cases in which a distressed investment fund was involved and where the fund did not have a relationship with the debtor prior to the restructuring. Sales under section 363 were used in 52% of the cases, sales under a plan of

[1] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. __ (2012); 132 S. Ct. 2065.

[2] *In re Fisker Automotive Holdings, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014).

[3] Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2625 (codified as amended at 11 U.S.C. § 101 et seq. (2006))(hereinafter, the "Bankruptcy Code").

[4] *See, e.g.,* Baird & Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. Pa. L. Rev. 1209, 1211 (2006); Baird & Rasmussen, *Reply, Chapter 11 at Twilight*, 56 Stan. L. Rev. 673, 675 (2003); Baird & Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751, 785 (2002); Skeel, *The Past, Present and Future of Debtor-In-Possession Financing*, 25 Cardozo L. Rev. 1905, at 1906-07 (2004); Skeel, *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. Pa. L. Rev. 917, 918 (2003); Miller & Waisman, *Is Chapter 11 Bankrupt?,* 47 Bost. Coll. L. Rev. 129 (2005).

[5] The market for distressed and defaulted debt (public and private) has been estimated at $1 trillion (face amount) annually. Altman, *The Role of Distressed Debt Markets, Hedge Funds and Recent Trends in Bankruptcy on the Outcomes of Chapter 11 Reorganizations,* NYU Stern Sch. Bus., Solomon Ctr. 2014.

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reorganization were used in another 24%, and only 20% of that sample pursued traditional plans of reorganization.[6]

Within the sphere of distressed investment funds, the so-called "loan to own" funds have attracted attention because they are sometimes accused of aggressive tactics and litigiousness. In a "loan to own" investment, the investor acquires the "fulcrum" security, meaning one that will give it the most control over the terms of a reorganization. Depending on the economics of the situation, the fulcrum security may be the first lien debt or the second lien debt; rarely will the fulcrum security consist of unsecured high-yield bonds or trade claims. After the investor acquires its position, it typically approaches the borrower's management and tries to enlist the debtor to support the investor's proposed reorganization. As noted above, that strategy will often consist of a sale of all, or substantially all, of the borrower's business. Where the investor has acquired the borrower's first lien debt, its leverage can be powerful. If the borrower resists, the lender can threaten to cease providing working capital loans or even threaten foreclosure. It can also credit bid its debt in any asset sale as a tool to prevent another buyer from acquiring the borrower's business. And as this article explores, it is often that combination of leverage and/or threats that results in claims of inequitable or other wrongful conduct against the distressed investor.

Origins of Credit Bidding

Under the Bankruptcy Code, a secured creditor is entitled to be paid in full, up to the value of its collateral, before any class of junior claims or interests receives any value or distribution.[7] To give teeth to that right, the drafters of the Bankruptcy Code inserted two parallel provisions that were designed to protect the right of secured creditors: section 1111(b) and section 363(k). These provisions were drafted in reaction to a notorious 1976 Chapter XII case, *In re Pine Gate Associates*.[8] In *Pine Gate,* the lender had a first mortgage on an apartment complex in the amount of approximately $1.5 million, and the property was appraised at slightly over $1 million. Under the debtor's plan, it proposed to pay the lender the cash value of its secured claim and treat the deficiency claim as unsecured. The secured lender objected, arguing that the plan could not be confirmed unless it was paid in full. But the bankruptcy court agreed with the debtor and confirmed the plan. Lenders viewed *Pine Gate* as a disastrous result, and as the drafting of the Bankruptcy Code took final shape in the late 1970s, they got protection in the form of sections 1111(b) and 363(k).

Section 1111(b) protects a lender from a *Pine Gate*-type problem, i.e., being cashed out under a plan of reorganization for less than the face value of its debt in a case where the debtor retains the collateral. If the lender makes the section 1111(b) election, the plan must provide that the creditor will receive total payments equal to the face amount of its claim and the present value of that payment stream cannot be less than the value of the collateral. For example, on the *Pine Gate* facts, where the lender had a mortgage of approximately $1.5 million, the total payments under the plan would have to have been at least equal to that amount, but the present value of those payments would only have to be equal to the $1 million value of the collateral. If a lender makes the section 1111(b) election, however, it waives its deficiency claim. But section 1111(b) does not apply to cases where the debtor sells the collateral, whether in a sale under section 363 or under a plan of reorganization. The legislative history of the Bankruptcy Code explained the limitation as follows: "Sale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of collateral under section 363(k) of the House amendment."[9]

Section 363(k) fills the void in secured creditor protection by providing:

> 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.

[6] Harner, Griffin & Ivey-Crickenberger, *Activist Investors, Distressed Companies and Value Uncertainty*, 22 Amer. Bank. Inst. L. Rev. 167 (2014) at 187.

[7] Under section 506(b) of the Bankruptcy Code, a secured creditor's claim is secured only to the extent of the value of its collateral. If the claim exceeds the value of the collateral, the excess — known as a deficiency claim — is unsecured. Under section 1129(b)(2) of the Bankruptcy Code, a secured claim is entitled to be paid in full before any distribution is made to the holders of any junior claims or interests.

[8] No. B75-4345A, 1976 WL 359641 (N.D. Ga. Oct. 20, 1976).

[9] 124 Cong. Rec. 32,406–07 (1978).

The purpose of section 363(k) is identical to section 1111(b): protecting a creditor against an involuntary sale or cash-out of its collateral at a value that it believes is depressed or otherwise does not reflect its inherent value. The mechanics of section 363(k) are straightforward; its use is limited to a creditor holding an allowed claim secured by a valid lien.[10] A creditor can credit bid the face amount of its claim, irrespective of the value of the collateral, and irrespective of the price paid for the claim. As set forth above, however, the court may limit or preclude credit bidding "for cause," a phrase not defined in the statute.

CONTROVERSY IN CREDIT BIDDING: THE CIRCUITS AND THE SUPREME COURT

Until the Fifth Circuit decided *In re Pacific Lumber* in 2009, credit bidding had not been a hot issue.[11] But *Pacific Lumber* presented a fact pattern somewhat analogous to *Pine Gate*: bondholders were cashed out for a valuation that they regarded as insufficient in a case where the debtor was selling the collateral to an affiliate of the senior secured lender under a plan of reorganization and they were being denied the right to credit bid. The plan proponents accomplished their objective by cramming down the bondholders under section 1129(b)(2)(A)(iii) of the Bankruptcy Code, which requires only that the secured lender receive the "indubitable equivalent" of the value of its collateral, rather than under section 1129(b)(2)(A)(ii), which provided the right to credit bid. Adding to the bondholders' unhappiness was the fact that the collateral was determined by the court, rather than through an open auction. The bondholders' argument was that section 363(k) was intended to prevent secured parties from having their collateral sold without their consent and that it was improper to allow the debtor and the plan proponents to utilize section 1129(b)(2)(A)(iii) to cut off their rights. The Fifth Circuit, which rejected the bondholders' argument, relied on statutory analysis of section 1129(b)(2)(A). It reasoned that the three alternatives for cramdown were written in the disjunctive and that a debtor was free to confirm a plan of reorganization under any of the three prongs. On the question of collateral valuation, the court said: "Whatever uncertainties exist about indubitable equivalent, paying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the Noteholders' collateral."[12]

Shortly after *Pacific Lumber* was decided, the Third Circuit reinforced its message in *In re Philadelphia Newspapers, LLC*, where, relying on *Pacific Lumber*, it also held that secured creditors could be denied the right to credit bid under a plan of reorganization so long as they received the indubitable equivalent of the value of their collateral.[13] In *Philadelphia Newspapers,* the debtors' plan called for an auction sale of substantially all of their assets, but required that all bids be in cash, thus precluding a credit bid. At a hearing on the proposed bid procedures for the auction sale, the bankruptcy court denied approval, ruling that the procedures had to provide the lenders to credit bid in accordance with section 1129(b)(2)(A)(ii).[14] On appeal, the district court reversed, agreeing with the *Pacific Lumber* analysis that section 1129(b)(2)(A) has three prongs and that a debtor may confirm a plan of reorganization so long as it satisfies any of the three tests. And because the "indubitable equivalent" test of section 1129(b)(2)(A)(iii) does not require credit bidding, a plan can be confirmed in reliance on that section without permitting credit bidding.[15] A split panel of the Third Circuit affirmed the district court decision, holding that the provisions of section 1129(b)(2)(A)(iii) were disjunctive.[16] Judge Ambro dissented, reasoning from the structure of the statute that in a case where the debtor intends to sell collateral, section 1129(b)(2)(A)(ii) alone should control, thus requiring credit bidding.[17] *Philadelphia Newspapers* exacerbated lenders' concerns about credit; they now had two adverse circuit court decisions in a short time span. *Pacific Lumber* could no longer be dismissed as an outlier decision.

The Supreme Court's RadLAX Decision

The Supreme Court appeared to assuage lender concerns about credit bidding in its unanimous decision in *RADLax Gateway Hotel, LLC v. Amalgamated*

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[10] Section 502(a) of the Bankruptcy Code provides that when a creditor files a proof of claim, that claim is allowed unless a party objects.

[11] *Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009).

[12] *Id.* at 247.

[13] *In re Phila. Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010).

[14] *In re Phila. Newspapers, LLC*, No. 09-11204SR, 2009 WL 3242292, at *4–5 (Bankr. E.D. Pa. Oct. 8, 2009).

[15] *In re Phila. Newspapers*, 418 B.R. 548, 552–55 (E.D. Pa. 2009).

[16] *In re Phila. Newspapers*, 599 F.3d 298 (3rd Cir. 2010).

[17] *Id.* at 319 (Ambro, J., dissenting).

Bank.[18] In *RADLax*, the debtor had borrowed funds to acquire and renovate a hotel, but ran into financial difficulties when it could not obtain additional funding. It then filed for chapter 11 and proposed to sell its assets in an open auction. As in *Philadelphia Newspapers*, the proposed auction rules required cash bids, meaning that credit bidding would not be permitted. The rationale was that cash bidding would lead to a more competitive auction process and that allowing the mortgagee to credit bid would discourage outside bidders. The debtor contended that its plan was permissible under *Pacific Lumber* and *Philadelphia Newspapers*, and that it could confirm a plan of reorganization under section 1129(b)(2)(A)(iii). But unlike the cases it relied on, in *RADLax* the debtor met with no success; its arguments were rejected first by the bankruptcy court,[19] then by the Seventh Circuit on direct appeal,[20] and finally by the Supreme Court.

On direct appeal to the Seventh Circuit, the debtors relied on *Pacific Lumber* and *Philadelphia Newspapers.* Presented with the opposing choices of the Fifth and Third Circuit opinions, and Judge Ambro's *Philadelphia Newspapers* dissent, the Seventh Circuit panel sided with Judge Ambro. The debtors urged that the lenders would receive the market value of their collateral because the collateral was to be sold at auction, with the lenders to receive the sale proceeds. The Seventh Circuit, though, found the debtors' argument "flawed" because of "a substantial risk that assets sold in bankruptcy auctions will be undervalued," a risk that can be allayed only by allowing the undersecured lender to credit bid up to the full amount of its claim. That way, the court reasoned, if a secured lender feels that the bids that have been submitted in an auction do not reflect the true value of the asset and that a sale at the highest bid price would leave them undercompensated, they may use their credit to trump the existing bids. The debtors' proposed auctions, the Seventh Circuit concluded, thus "lack a crucial check against undervaluation" and accordingly create "an increased risk that the winning bids in these auctions would not provide the Lenders with the current market value of the encumbered assets."[21]

The Supreme Court granted certiorari to decide the question "[w]hether a debtor may pursue a chapter 11 plan that proposes to sell assets free of liens without allowing the secured creditor to credit bid, but instead providing it with the indubitable equivalent of its claim under Section 1129(b)(2)(A)(iii) of the Bankruptcy Code."[22] On May 29, 2012, a unanimous court answered that question in the negative in an opinion written by Justice Scalia, holding that "debtors may not sell their property free of liens under §1129(b)(2)(A) without allowing lienholders to credit bid, as required by clause (ii)."[23] The court's opinion followed principles of statutory construction; no resort was made to legislative history, policies underlying the Bankruptcy Code, or related statutory provisions. The core of the court's ruling was reliance on the canon of construction "that the specific governs the general, "with "the specific" being "clause (ii) [which] is a detailed provision that spells out the requirements for selling collateral free of liens" and "the general" being "clause (iii) [which] is a broadly worded provision that says nothing about such a sale." In that situation, "[t]he general/specific canon explains that the 'general language' of clause (iii), 'although broad enough to include it, will not be held to apply to a matter specifically dealt with' in clause (ii)."[24] Justice Scalia explained that if a free and clear cramdown sale could be effected under (iii)'s indubitable equivalent test, without credit bidding, there would be no role left for subsection (ii), which allows a free and clear sale only with credit bidding.[25] Notably, however, the Supreme Court decision did not address the dicta in the *Philadelphia Newspapers* decision in which that court recognized the ability of a court to limit credit bidding "for cause."

FISKER AND ITS PROGENY

The Supreme Court's strong opinion in *RADLax* appeared to bring certainty to credit bidding. Lenders' fears that they would no longer be able to rely on credit bidding were abating when the bankruptcy court for the District of Delaware shattered that brief calm with its decision in *In re Fisker Automotive Holdings, Inc.*[26] Fisker Automotive Holdings, Inc. ("Fisker") was a start-up established to design and build hybrid plug-in electric automobiles. Prior to commencing its chapter 11 case, it

[18] 566 U.S. ___ (2012): 132 S. Ct. 2065.

[19] *In re River Rd.*,2010 WL 6634603, at *2.

[20] *River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011).

[21] *Id*. at 651.

[22] Petition for Writ of Certiorari, RadLAX Gateway Hotel, 132 S. Ct. 2065 (No. 11-166), cert granted, 132 S. Ct. 845 (2011).

[23] 132 S. Ct. at 2072. The vote was 8-0, as Justice Kennedy took no part in the decision. *Id*. at 2068.

[24] *Id.* at 2071-2072.

[25] *Id.* at 2071.

[26] 510 B.R. 55 (Bankr. D. Del 2014).

had raised $1.2 billion in private capital, which included such celebrity investors as Leonardo DiCaprio, Justin Bieber, and Aston Kutcher. Among the lenders to Fisker was the United States Department of Energy, which had lent $168.5 million.

Hybrid Tech Holdings LLC ("Hybrid"), a rival developer of hybrid vehicles, purchased the Department of Energy claim in October 2013 for $25 million and began negotiations with Fisker to purchase substantially all of its assets. Fisker filed for chapter 11 on November 22, 2013. The debtor then filed papers with the bankruptcy court seeking approval of the sale to Hybrid on an accelerated schedule that called for the sale to be consummated on January 3, 2014. The creditors committee objected, arguing that Hybrid's credit bid would chill the bidding and that it should not be allowed to credit bid. Among other things, it argued that there were *bona fide* disputes as to the validity and extent of Hybrid's liens. Of critical importance, the creditors committee had located an alternative bidder, and told the court that if Hybrid's right to credit bid was denied or limited, the alternative bidder was prepared to become a cash bidder at a level above $25 million, the amount that Hybrid paid for the Department of Energy loan. The debtor stipulated with the committee that if Hybrid were allowed to credit bid the full amount of its claim, it was not likely that any other parties would participate in the auction.

The bankruptcy court limited Hybrid's right to credit bid, for cause, to $25 million. In doing so, the court found, based on the stipulations between Fisker and the creditors committee, that if Hybrid's credit bid were to be more than $25 million, the alternative buyer would not enter the auction.[27] The court also found that Fisker and Hybrid had insisted upon a "hurried process" without explanation, raising fairness concerns.[28] Regarding the disputed collateral, the court found that where the validity of a lien has not been determined, the holder may not bid its secured debt.[29] Based on these findings, the court concluded that failing to cap Hybrid's credit bid would freeze bidding and identified this as the "for cause" basis for limiting Hybrid's credit bid.[30] The U.S. District Court of the District of Delaware denied Hybrid's motion for leave to appeal, noting that *Philadelphia Newspapers* recognized that a court may limit the right to credit bid in order to foster a competitive bidding environment.[31]

In re Free Lance-Star Publishing Company

In June 2013, DSP, a company operated by Sandton Capital Partners, purchased from Branch Banking and Trust its $50.8 million secured loan to Free Lance-Star, a newspaper, radio, and communications company located in Fredericksburg, Virginia. But the liens in favor of Branch Banking did not include certain assets owned by Free Lance-Star, including its radio towers and FCC license. Shortly thereafter, DSP informed Free Lance-Star that it wanted the company to file for chapter 11 and sell substantially all of its assets to DSP pursuant to section 363. Free Lance-Star initially agreed to work with DSP on implementing a plan for a chapter 11 filing, but prior to the filing, negotiations between the parties broke down. In the interim, without notifying the debtor, DSP filed liens against the previously unencumbered assets.[32]

On January 23, 2014, Free Lance-Star filed under chapter 11 and sought approval of bidding procedures for an auction of substantially all of its assets. On March 10, 2014, the court approved the bidding procedures, including the right of DSP to credit bid its claim against the assets on which it had valid liens. The same day, DSP filed a complaint seeking a declaration that DSP had valid and perfected liens on substantially all of Free Lance-Star's assets, and that it had the right to credit bid its claim at the sale. DSP also filed a motion seeking summary judgment on all counts in its complaint. Free Lance-Star then filed a cross motion for summary judgment against DSP, arguing that cause existed to limit DSP's credit bid amount.[33] Based on an extensive evidentiary record, the court found that (i) DSP did not have valid, properly perfected liens on certain contested property; (ii) DSP could not credit bid a claim against assets on which it lacked a valid lien; and (iii) DSP had engaged in inequitable conduct that required the court to limit its credit bid right to foster a competitive bidding process.[34] The court found DSP had engaged in inequitable conduct by influencing the

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[27] *Id.* at *10.

[28] *Id.* at *14, 16.

[29] *Id.* at *16.

[30] *Id.* at *14.

[31] *Hybrid Tech Holdings, LLC v. Official Comm. Of Unsecured Creditors of Fisker Auto. Holdings, Inc. (In re Fisker Auto. Holdings, Inc.)*, 2014 U.S. Dist. LEXIS 15497, 16, Case No. 14-CV-99 (GMS) (D. Del. Feb. 7, 2014).

[32] *In re Free Lance-Star Pub. Co.*, 512 B.R 798 (Bankr. E.D. Va. 2014).

[33] *Id*. at 806.

[34] *Id*. at 806-807.

asset sale process by exerting pressure on Free Lance-Star for a speedy bankruptcy filing; insisting Free Lance-Star shorten the marketing period for the sale; and insisting Free Lance-Star conspicuously advertise DSP's credit bid right in the sale marketing materials. Based on these findings, the court held that "[t]he confluence of (i) DSP's less than fully secured lien status; (ii) DSP's overly zealous loan to own strategy; and (iii) the negative impact DSP's misconduct has had on the auction process has created the perfect storm, requiring curtailment of DSP's credit bid rights."[35] DSP appealed the bankruptcy court's ruling to the district court, but its appeal was rejected.[36] *Free Lance-Star* was a case where the bankruptcy court was presented with clear evidence that the secured creditor had engaged in serious inequitable conduct, leading it to determine that limiting its right to credit bid was an appropriate remedy.

In re RML Development, Inc.

RML Development, Inc. was a debtor that owned two apartment complexes in Tennessee. After it filed for chapter 11 in 2014, it filed a motion to sell substantially all of its assets. Its secured lender, an affiliate of a hedge fund called SilverPoint, sought to credit bid the full amount of its claim, which it asserted was \$2.54 million. The debtor disputed the amount of the claim contending that SilverPoint was owed \$2.35 million, and sought to deny SilverPoint's ability to credit bid contending that credit bidding would chill the bidding for its assets.[37] The court limited the amount that SilverPoint would be allowed to bid to the undisputed portion of its claim, \$2.35 million, but otherwise put no restriction on its ability to credit bid.[38] It then issued a strong opinion generally supporting the right to credit bid: "The bankruptcy court should only modify or deny a §363(k) credit bid when equitable concerns give it cause. This court believes such a modification or denial of credit bid rights should be the extraordinary exception and not the norm."[39] The lesson to be drawn from *RML Development* is that a challenge to credit bidding will not succeed where there is no genuine cause or misconduct on the part of the lender. Although there was a *bona fide* dispute as to the amount of the secured creditor's claim, the court was not willing to take the extraordinary step of limiting the creditor's credit bidding rights over what it clearly viewed as a garden-variety dispute of modest scope.

In re Charles Street AME Church

While *Fisker* made a prominent appearance in the *Free Lance-Star* appeal (and underlying decision), it only played a minor role in the credit bidding decision issued in the chapter 11 case of Charles Street African Methodist Episcopal Church of Boston ("Charles Street").[40] Charles Street was the owner of two adjoining parcels of real property. In its chapter 11 case, Charles Street filed a motion requesting authority to sell all of its assets free and clear of all liens to a stalking horse bidder (ABCD). It also sought to bar OneUnited, a bank that held mortgages on the properties, from submitting a credit bid, or if the court permitted credit bidding, requiring OneUnited to tender at least \$210,000 in cash as to pay ABCD's break-up fee. Charles Street also filed an objection to OneUnited's claim, which was based on a its mortgage loans to Charles Street and secured by its real estate assets. In its claim objection, Charles Street asserted three setoff counterclaims against OneUnited that, if successful, would have eliminated OneUnited's claim.

Charles Street argued that its claim objection established that OneUnited's claim was subject to a *bona fide* dispute and for that reason there was cause to deny OneUnited's right to credit bid. The bankruptcy court acknowledged that the existence of a *bona fide* dispute often constitutes cause to deny credit bidding, but found that the counterclaims asserted in Charles Street's objection "[did] not amount to cause to prohibit credit bidding."[41] The court explained that "Charles Street does not dispute the validity of the underlying loan agreements, the validity, perfection, or priority of OneUnited's mortgages, the amounts claimed to be due, or anything intrinsic to either of OneUnited's claims. Nor does Charles Street allege that the mortgages or loan agreements may be avoided."[42] Because the court determined that there was no dispute about the "validity or extent of OneUnited's secured claims," it permitted OneUnited to credit bid. With respect to the break-up fee, the court agreed that the need to fund the break-up fee constituted cause to *limit* (but not deny) OneUnited's

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[35] *Id*. at 807-808.

[36] *Free Lance-Star*, 2014 U.S. Dist. LEXIS 63274 (E.D. Va. 2014).

[37] *In re RML Development, dba Pinetree Place Apartments dba Raintree Apartments*, No. 13-29244 (Bankr. W.D. Tenn. July 10, 2014).

[38] *Id.*

[39] *Id.*

[40] Case 12-12292 FJB, (Bankr. D. Mass 2012).

[41] *Id.* at 457.

[42] *Id.* at 458.

right to credit bid. Thus, the court required OneUnited to include $50,000 in cash with any bid (not $210,000). Notably, in its opinion the court stated that because Charles Street "expressly disavow[ed] any reliance on [*Fisker*] and its rationale," it did not need to address the "types of 'cause'" at issue in *Fisker*.[43]

Radio Shack

Radio Shack is a recent case in which a challenge to a senior lender's proposed use of credit bidding was made, not by the debtor, but by another lender that was itself a bidder for the debtor's assets, which hoped that by disqualifying the senior lender from credit bidding, it would gain an advantage for its own bid. Radio Shack filed its chapter 11 petition in the Bankruptcy Court for the Southern District of New York in February 2015; prior to that time, it had entered into a $585 million revolving credit facility for which GE Capital acted as agent for the lenders (the "Senior Lenders"). It was also party to a $250 million term loan facility for which Salus Capital Partners ("Salus") acted as agent for the lenders (the "Term Lenders"). As is typical where a borrower is party to multiple credit facilities, there was an intercreditor agreement between the Senior Lenders and the Term Lenders that spelled out priorities of payment and rights vis-à-vis their different packages of collateral. In 2014, GE Capital sold its position to a hedge fund called Standard General, which restructured the revolving facility by reducing the amount of the revolving line of credit and amortizing the remaining balance, effectively turning the amortizing balance into a term loan.

After Radio Shack filed for chapter 11, Standard General made a bid for substantially all of its assets, which was comprised of a $117 million credit bid and cash for the balance. Salus then filed an adversary proceeding, seeking to preclude Standard General from credit bidding. Salus's argument was that by restructuring the credit facility, Standard General had reduced the amount of the Senior Lender facility that was senior to the Term Lenders to $111 million. Notably, the complaint filed by Salus did not allege any misconduct or inequitable behavior by Standard General. At the same time that it was challenging Standard General's right to credit bid, Salus was also pursuing its own bid for Radio Shack's assets, which also contained a credit bidding component. Given that Salus alleged no misconduct by Standard General, it is apparent that Salus's real purpose was to obtain an advantage in the auction process by precluding or reducing Standard General's right to credit bid. Although no opinion on the case was published, Standard General agreed to reduce the amount of its credit bid to $112 million and ultimately won the auction.

R.L. Adkins Corp.

An involuntary chapter 7 petition was filed against this debtor in July 2011, who then converted the case to a chapter 11 proceeding. At the end of 2012, a prospective purchaser proposed a chapter 11 plan under which the debtor would sell 90 mineral leases and some oil wells in a private sale. A creditor had a lien on four of the mineral leases and one well as security for its claim of $320,000, but the collateral was only valued at $39,000. In March 2013, the creditor filed a section 1111(b) election; later that month the plan was confirmed and the creditor did not appeal. Later the bankruptcy court denied the section 1111(b) election and the district court affirmed. On appeal, the Fifth Circuit affirmed, ruling that the creditor could not make a section 1111(b) election because the debtor's property had been sold and the creditor had the right to make a credit bid under section 363(k) of the Bankruptcy Code. The Fifth Circuit noted that the plan set forth the right of secured creditors to make a credit bid; and the same right was contained in the confirmation order. If the creditor had been uncertain about which remedy to exercise, it should have raised the issue at confirmation, not on appeal.

In a concurring opinion, Judge Jones noted, however, that the process was unfairly opaque to the secured creditors, writing that:

> The majority unwisely steps beyond this narrow holding, however, when they appear to conclude that the bulk sale of the debtor's assets, which occurred outside a public auction and included multiple assets burdened by multiple liens, nevertheless protected a secured creditor's right to credit bid. The majority so holds only because the reorganization plan and confirmation order both perfunctorily incant § 363 of the Bankruptcy Code… In my view, the majority's holding, if extended beyond the facts before us, begs a very serious question about the implementation of credit bidding and therefore the protection of the secured creditor's rights.[44]

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[43] *Id.* at 457.

[44] *Baker Hughes Oilfield Operations, Inc. v. Morton (In re R.L. Adkins Corp.)*, Case 14-10768 (5th Cir. April 23, 2015).

Although *Adkins* is not a case addressing the "for cause" limitations of section 363(k), it does illustrate the interrelationship of credit bidding and the section 1111(b) election. It also raises the issue of how to protect the right of a creditor to credit bid when a debtor proposes a bulk sale of its assets (as is common in section 363 sales) and the creditor has liens on only a subset of the debtor's assets. Does it truly protect such a creditor to say it has the right to credit bid, when its discrete collateral may have no value when not used in conjunction with the debtor's other assets? As section 363 sales continue to proliferate, it is likely that additional cases will pose this issue.

LESSONS FROM RADLAX AND FISKER

RadLAX confirmed that secured creditors have the right to credit bid, and that *Pacific Lumber* and *Philadelphia Newspapers* had reached incorrect results. But *Fisker* also confirmed that the "for cause" limitation on credit bidding was not merely excess language in the statute, that it had meaning, and that when cause exists, credit bidding can be limited or barred. As the survey of post-*Fisker* cases demonstrated, this is still an emerging question and the contours of cause remain to be fully developed. Nevertheless, there are some clear lessons from the cases: (1) creditors who engage in misconduct face a risk of being barred from credit bidding; (2) courts are openly skeptical of any tactics used to chill the bidding or preclude a full, fair, and complete auction process, and that skepticism extends to bidding procedures that do not provide for an adequate post-petition marketing period; (3) presenting the court with a real, as opposed to hypothetical counter-bidder, strengthens the case for limiting credit bidding; and (4) mere boilerplate allegations of cause are insufficient; as the court in *RML Development* noted, credit bidding remains the default rule; challenges to credit bidding that lack substance will not be sustained. *See,* e.g., *Charles Street* and *Radio Shack*. ■