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Note

A NEW APPROACH TO SECTION 363(F)(3)

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Section 363(f) of the Bankruptcy Code provides five circumstances in which a debtor may be permitted to sell property free of all claims and interests, outside of the ordinary course of business, and prior to plan confirmation. One of those five circumstances is contained in § 363(f)(3), which permits such a sale where the “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.” While it is far from certain whether § 363(f)(3) requires a price “greater than the aggregate [face value] of all liens on the property”--the face value approach--or a price that is “greater than aggregate [economic value] of all liens on the property”--the economic value approach, this Note argues that, properly understood, both approaches should lead to the same result. More specifically, under this Note's strict textual approach, the choice between these two meanings of “value” in § 363(f)(3) is irrelevant; neither interpretation of § 363(f)(3) permits courts to authorize the sale of property securing underwater liens--that is, liens whose face value exceeds the fair market value of the property securing it.

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***1530 Introduction**

Since the early nineteenth century, American businesses have enjoyed a unique mechanism for the orderly repair or liquidation of troubled companies, prescribed by Congress pursuant to its authority to enact “uniform Laws on the subject of Bankruptcies.”¹ The current Bankruptcy Code was enacted in 1978 by section 101 of the Bankruptcy Reform Act of 1978 (the “Code”).² When a company files for bankruptcy protection under Chapter 11 of the Code, the debtor³ and its stakeholders become entitled to certain protections under federal law while they formulate a plan to restructure or liquidate.⁴ While this plan is being formulated, the debtor continues to operate its business relatively freely.⁵ However, the ability of the debtor to dispose of property outside the ordinary course of its business is limited.⁶ Generally, the debtor must make such dispositions pursuant

to its plan, which is subject to an array of Code-imposed restrictions intended to protect the debtor's various constituents.⁷ Pursuant to § 363(b) of the Code, however, the court may authorize the sale of property outside of the ordinary course of the debtor's business at any point during the bankruptcy process (a "363(b) Sale").⁸ Such sales are not subject to the various restrictions present in the plan approval process.⁹ Rather, 363(b) Sales are subject to their own legislatively and judicially imposed safeguards.¹⁰ But these safeguards are far weaker than their Chapter 11 counterparts.

***1531** Generally, when a nonbankrupt debtor sells encumbered property other than in the ordinary course of business, creditors holding liens on the disposed-of property receive dual liens: the creditors' liens on the property continue against the purchaser, and the creditors are entitled to a new lien on the proceeds of the sale in the hands of the debtor.¹¹ Similarly, when a bankrupt debtor sells property outside of the ordinary course of its business in a 363(b) Sale, secured creditors generally continue to be protected by these two liens.¹² As a practical matter, however, the sale of property subject to a lien dramatically reduces the amount a buyer will pay for the property.

A bankrupt debtor can sell property outside of the ordinary course of its business in a way that releases liens on the disposed-of property in two ways (although the lien on the proceeds of the sale may remain intact).¹³ The first is the standard Chapter 11 plan confirmation process, subject to the various Chapter 11 safeguards.¹⁴ In the second, the court can extinguish all liens on property sold in a 363(b) Sale--without regard to the Chapter 11 safeguards--if the parties satisfy one of the five conditions of § 363(f) (a "363(f) Sale").¹⁵ In both cases, a secured creditor's claim on the property sold is extinguished.¹⁶

Section 363(f) provides five circumstances in which a debtor may be permitted to sell property free of all claims and interests, outside of the ordinary course of business, and prior to plan confirmation.¹⁷ Section 363(f)(3) permits such a sale where the "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."¹⁸ There is substantial and legitimate disagreement as to whether § 363(f)(3) requires the property to be sold for a price "greater than the aggregate [face value] of all liens on the property"--the face value approach--or a price that is "greater than the aggregate [economic value] of all liens on the property"--the economic value approach.¹⁹ However, the two approaches should produce the same result unless, as some courts adopting ***1532** the economic value approach reasoned, "greater than" means "equal to or greater than."²⁰

This Note argues that courts interpreting § 363(f)(3) to refer to the economic value of the underlying lien incorrectly interpret the phrase "greater than" to mean "equal to or greater than." Unless and until courts justify that interpretation, neither the face value approach nor the economic value approach should be used to permit the sale of property securing a lien where the lien is underwater.²¹ Part I introduces the Chapter 11 plan confirmation process as the backdrop for 363(f) Sales and explains the courts' dueling approaches over the proper interpretation of § 363(f)(3). Part II advocates a third interpretation: the strict textual approach. Under the strict textual approach, § 363(f)(3) does not permit courts to authorize the sale of property secured by an underwater lien free of that lien irrespective of whether "value" is interpreted to mean face value or economic value.

I. Introduction to Bankruptcy

Historically, 363(b) Sales occupied a supporting role in Chapter 11 bankruptcies, allowing a company to dispose of relatively insignificant property where a delay in disposition would be particularly costly.²² Today, 363(b) Sales have evolved to a position of near-equal footing with sales arising under Chapter 11's standard plan confirmation process.²³ As In re Chrysler demonstrated, a 363(b) Sale can even entirely eclipse the standard Chapter 11 plan confirmation process.²⁴ As 363(b) Sales

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become more common, so too will 363(f) Sales, which operate through § 363(b). Because property not sold in a 363(b) Sale will likely be disposed of in the standard Chapter 11 plan confirmation process, every 363(b) Sale takes place in the shadow of the standard Chapter 11 plan confirmation process. As a result, understanding Chapter 11, and the protection it provides during the normal Chapter 11 plan confirmation process, is critical to understanding 363(b) Sales and 363(f) Sales. Indeed, it is precisely the relative lack of protection available in 363(f) Sales that distinguishes it from the standard Chapter 11 plan confirmation process.

To that end, Section I.A provides a primer on the standard Chapter 11 plan confirmation process for corporate debtors. Section I.B then introduces 363(b) Sales (through which 363(f) Sales operate), explains their interaction with the standard Chapter 11 plan confirmation process, and contrasts the comprehensiveness of the mechanisms employed by each to safeguard *1533 against abuse. Section I.C introduces § 363(f) and describes the five circumstances in which a 363(b) Sale may be accomplished free and clear of all claims and interests of creditors, equity security holders, and general partners (i.e., a 363(f) Sale). Section I.D then explores the two competing interpretations of § 363(f)(3) and concludes that a careful analysis of the plain language, legislative history, and purpose of § 363(f)(3) does not provide compelling support for either.

A. The Standard Chapter 11 Plan Confirmation Process

Chapter 11 provides a mechanism for companies with viable businesses that are experiencing temporary difficulties to reorganize and continue to operate as “going concerns.”²⁵ Rather than force the liquidation of the company, the Code encourages the parties to formulate a plan of reorganization.²⁶ Upon filing for bankruptcy, all creditors must stop individual collection activities against the debtor (the “automatic stay”).²⁷ Without this protection--placing creditors in a figurative waiting room while each claim is prioritized--the rush of creditors seeking to enforce their claims before the debtor's money runs out would cause a snowball effect. The automatic stay thus protects the debtor from its creditors and its creditors from one another.²⁸

The Code permits the appointment of a trustee to represent and manage the debtor during bankruptcy; but in practice, the debtor generally remains in possession of the business and undertakes some functions and powers of the trustee.²⁹ The trustee (or the debtor, exercising the functions and powers of the trustee) is vested with significant discretion to continue to operate the debtor's business in the ordinary course, without the approval of the court.³⁰ For example, the trustee can purchase new inventory, borrow money for operations, and hire and fire employees, among other activities.³¹ But the trustee's power to take extraordinary action-- action outside of the ordinary course of business, such as selling a major manufacturing facility--is more limited; action outside the ordinary course of business generally requires notice to all interested parties, a hearing, and a finding by the court that the proposed transaction serves the best interests of the estate and furthers the *1534 legitimate ends of bankruptcy.³² All else being equal, courts generally prefer simply including in the debtor's plan transactions that are outside of the ordinary course.³³

For four months, the debtor has the exclusive right to propose a plan of reorganization to the court.³⁴ The plan classifies and prioritizes creditors' claims and attempts to satisfy them in an orderly manner.³⁵ The plan must group the various claims into classes of similar claims,³⁶ specify which classes are impaired,³⁷ and treat all claims or interests within each class alike.³⁸ The debtor's plan must comply with certain requirements dealing with disclosure,³⁹ notice,⁴⁰ and voting,⁴¹ and the debtor's plan must satisfy the best interest of creditors test⁴² and the absolute priority rule⁴³ (together, the “Chapter 11 Safeguards”).⁴⁴ After this extensive disclosure and hearing process the court may permit a sale of property free of all claims and interests by approving the plan.⁴⁵

As explained in the next section, however, none of these restrictions apply when assets are sold in a 363(b) Sale. As a result, 363(b) Sales--and to a much greater extent, 363(f) Sales--may be used "to circumvent the carefully *1535 crafted [Chapter 11 Safeguards],"⁴⁶ and their provisions should be interpreted with that in mind.

B. The Impact of Section 363(b)

With the court's permission, debtors can sell assets outside of the ordinary course of business, prior to plan confirmation, in a 363(b) Sale.⁴⁷ Because 363(b) Sales proceed much more quickly than the normal Chapter 11 plan confirmation process--their very purpose is to expedite transactions that cannot wait until plan confirmation--and without the Chapter 11 Safeguards, the attendant potential for abuse is far greater.⁴⁸ Historically, that risk was mitigated to a large extent because 363(b) Sales were confined to the sale of relatively insubstantial assets, particularly those that were quickly deteriorating in value;⁴⁹ such sales effectively waived many of the Chapter 11 Safeguards where a failure to do so would cause substantial harm to the debtor (and therefore to the creditors as well).⁵⁰ Today, however, that is no longer the case.⁵¹ Indeed, as one commentator observed: "[S]ales are now part of the warp and woof of chapter 11 practice. Of the 10 largest chapter 11s of 2002, eight used the bankruptcy court as a way of selling their assets to the highest bidder, whether piecemeal or as a going concern."⁵²

*1536 Court discretion to authorize 363(b) Sales has expanded substantially over the years.⁵³ When § 363(b) was added to the Code in 1978, it expanded access to preconfirmation sales outside of the ordinary course of business by eliminating the requirements that the debtor show cause or make any reference to an "emergency" or "perishability" requirement at all.⁵⁴ This change went largely unnoticed until the Second Circuit's 1983 decision in *In re Lionel*. The *Lionel* court permitted a 363(b) Sale even though the asset's value was not quickly deteriorating--there was no "melting ice cube."⁵⁵ Despite the broad, virtually limitless language of § 363(b), the *Lionel* court refused to grant the bankruptcy court "carte blanche," which would undermine the Code's underlying policy of protecting the interest of creditors and investors.⁵⁶ Rather, *Lionel* required that the judge find "a good business reason" before approving a 363(b) Sale.⁵⁷ Similarly, the Fifth Circuit, in *In re Continental Airlines*, found that "implicit in § 363(b) is the further requirement of justifying the proposed transaction."⁵⁸

While some commentators have criticized the 1978 expansion of 363(b) Sales, arguing that "[b]y relaxing the standard for a [363(b) Sale], the courts introduced the risk that § 363 could be used to circumvent the carefully crafted [Chapter 11 Safeguards],"⁵⁹ others see 363(b) Sales as too attractive a business proposition to ignore.⁶⁰ The latter argue that bankrupt companies, *1537 which tend to come from declining industries, should consolidate, and "[i]f a few terms have to be handled in the § 363 sale that would ordinarily be handled under [the normal Chapter 11 plan confirmation process], then courts, and bankruptcy doctrine, should find a way to accommodate the quick sale, but without scuttling the entire [structure of Chapter 11 Safeguards]."⁶¹

While courts today agree that a debtor should not be permitted to use a 363(b) Sale to strategically avoid Chapter 11 Safeguards,⁶² they disagree on the contours of this prohibition.⁶³ On the one hand, the Fifth Circuit imports the absolute priority rule--one of the Chapter 11 Safeguards--into the 363(b) Sale context.⁶⁴ The rule provides that "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property."⁶⁵ The Fifth Circuit also prohibits *sub rosa* plans: 363(b) Sales that make priority and voting determinations that would normally be addressed during the standard Chapter 11 plan confirmation process.⁶⁶ A sale that

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“allow[s] [the] debtor to gut the bankruptcy estate before reorganization or to change the fundamental nature of the estate's assets in such a way that limits a future reorganization plan” would be off-limits.⁶⁷

On the other hand, the Second Circuit has adopted a more flexible approach, allowing a case-by-case determination based on the relevant facts and circumstances.⁶⁸ While acknowledging that whether a settlement is “fair and equitable”⁶⁹ is important and often dispositive, the court has refused to adopt the Fifth Circuit's bright line rules.⁷⁰ Instead, the Second Circuit *1538 allows courts to “endorse a settlement that does not comply in some minor respects with the priority rule if the parties to the settlement justify, and the reviewing court clearly articulates the reasons for approving, a settlement that deviates from the priority rule.”⁷¹ To that end, the “size of the transaction, and the residuum of corporate assets, is . . . just one consideration for the exercise of discretion, along with an open-ended list of other salient factors.”⁷² The Second Circuit has suggested an open-ended list of salient factors:

[T]he proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value.⁷³

Because every case will present some of these factors, such a nondispositive list of factors gives Second Circuit courts far more discretion than their Fifth Circuit counterparts.

While the standards for allowing 363(b) Sales are in flux, increased acceptance of 363(b) Sales puts tremendous pressure on § 363(f). If 363(b) Sales cannot be made free of liens, many such sales will not be possible--an unfortunate result given their attractiveness as a business matter. While both approaches to 363(b) Sales clearly recognize the potential for abuse, the safeguards established by the Second Circuit, and to a lesser extent by the Fifth Circuit, do not provide the same level of protection to secured creditors as do the Chapter 11 Safeguards.

C. Protection in Section 363(f)

Outside of the standard Chapter 11 plan confirmation process,⁷⁴ a debtor may be permitted to sell property outside of the ordinary course of business free of all claims and interests only by satisfying one of the five conditions of § 363(f) (i.e., in a 363(f) Sale).⁷⁵ However, unlike sales pursuant to the standard Chapter 11 plan confirmation process, 363(f) Sales occur without *1539 the benefit of the Chapter 11 Safeguards--the disclosure, notice, voting, and priority safeguards discussed in Section I.A-- to protect secured creditors.⁷⁶

The five conditions of § 363(f) are:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) [the creditor] 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.⁷⁷ Section 363(f)(1) ensures that an otherwise legal and equitable sale is not held up due to technicalities arising out of bankruptcy law by allowing a sale free of all interest where applicable nonbankruptcy law permits such a sale.⁷⁸ Section 363(f)(2) ensures that a sale will not be impeded where all parties with an interest in the relevant asset have consented, recognizing the possibility that the creditor may want to surrender the protection otherwise afforded by the Code.⁷⁹ Section 363(f)(4) “can be used as an expeditious method to clear title to a disputed asset” by allowing “productive assets subject to deadlocking disputes” to be placed with a third party and utilized while the original parties resolve their dispute.⁸⁰ Section 363(f)(5) permits a sale where the creditor could be compelled to accept a payment in exchange for its interest in a hypothetical nonbankruptcy proceeding that is “broadly accepted.”⁸¹

Each of these provisions describes a narrow circumstance in which Congress has determined that the importance of maintaining the creditor's lien on the disposed-of property is outweighed by some other factor.⁸²

***1540 D. Evaluating the Face Value Approach and the Economic Value Approach**

Section 363(f)(3) permits a 363(f) Sale where the “price at which such property is to be sold is greater than the aggregate value of all liens on such property.”⁸³ There is substantial and legitimate disagreement as to whether § 363(f)(3) requires the property to be sold for a price “greater than the aggregate [face value] of all liens on the property” (the face value approach) or a price that is “greater than the aggregate [economic value] of all liens on the property” (the economic value approach).⁸⁴ The one bankruptcy appellate panel that directly addressed the issue adopted the face value approach;⁸⁵ other courts continue to fall ***1541** on either side.⁸⁶ A careful analysis of the plain language, legislative history, and purpose of § 363(f)(3) does not provide compelling support for either the face value approach or the economic value approach.

The word “value” has no plain meaning as applied to a lien. On the one hand, the reference to the “value,” rather than to the “amount,” of the lien argues in favor of the economic value approach. However, when Congress intends to denote the concept of economic value in the Code, it usually refers to the value of “claims” rather than to the value of “liens.”⁸⁷ This raises a question as to whether the reference to “value” in § 363(f)(3) is “simply an unfortunate deviation from the Code's general preference to refer to claims, and not liens, or whether it has some other significance.”⁸⁸ Perhaps using a word other than “claims”--a term used exhaustively throughout the Code to refer to economic value concepts, and one of which Congress has intimate knowledge⁸⁹--reflects Congress's intent to refer to something other than economic value. As discussed below, the economic value of a lien is not an obvious concept.⁹⁰ Still, if Congress meant to say “amount of the lien,” it could have done so. Thus, consideration of the plain language does not end the inquiry.

When construing statutory language, consideration should be given to the way similar terms are used in other areas of the Code.⁹¹ Advocates of the economic value approach ascribe a meaning to the word “value” consistent with its use in § 506(a),⁹² a section that uses “value” for other related ***1542** purposes.⁹³ They point out that the amount of an allowed secured claim pursuant to § 506(a) generally cannot exceed the value of the property securing the claim, and that a secured claim is a form of a lien.⁹⁴ Applying the well-settled rule of statutory interpretation *noscitur a sociis*⁹⁵--Latin for “it is known from its associates”--some courts conclude the term “value” employed in § 363(f)(3) should be similarly interpreted.⁹⁶ The Supreme Court has

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employed a similar analysis in the past to hold that the phrase “value of such entity's interest” in § 361(1) and (2), when applied to secured creditors, should mean the same as the phrase “value of such creditor's interest” in § 506(a).⁹⁷ The Supreme Court could do the same to the expression “value of all liens on the property” in § 363(f)(3).⁹⁸

However, these two provisions exist in very different contexts, casting some doubt on that proposition. First, § 506(a) makes determinations as part of the normal Chapter 11 plan confirmation process, subject to the Chapter 11 Safeguards. On the other hand, § 363(f)(3) allows debtors to circumvent the normal Chapter 11 plan confirmation process--and the Chapter 11 Safeguards--to do what they ordinarily may not.⁹⁹ Second, § 506(a) deals with the value of property, while § 363(f)(3) deals with the value of a lien, a much more amorphous concept. Indeed, the economic value of a lien is not at all obvious. Courts seem to almost universally equate the economic value of a lien with the fair market value of the property securing the lien,¹⁰⁰ and the remainder of this Note accepts that interpretation. However, the term could just as easily refer to the excess of (i) the lesser of (a) the face value of the lien and (b) the fair market value of the property securing the lien, over *1543 (ii) the value of the claim on an unsecured basis--this is the value added by the lien.¹⁰¹

The legislative history, however, refers to the “amount,” not the “value,” secured by the lien.¹⁰² While acknowledging these statements, some courts argue that Congress was not focusing on this particular distinction when making these comments.¹⁰³ Instead, these courts point to statements in a Senate Report speaking more broadly about the purpose of the Code, which emphasizes that it is “the value of the collateral” that deserves protection.¹⁰⁴ However, the statements emphasizing that it is “the value of the collateral” that deserves protection were made with respect to Code sections that are subject to the Chapter 11 Safeguards and are therefore not analogous with those--like § 363(f)(3)--that are not.¹⁰⁵

II. Section 363(f)(3) Does Not Apply to Underwater Liens

Section § 363(f)(3) permits the sale of property securing a lien free of that lien if the price at which such property is sold is “greater than the aggregate value of all liens on such property.”¹⁰⁶ Section II.A explains that the uncertainty as to whether § 363(f)(3) refers to the economic value or the face value of the lien is actually irrelevant, since courts adopting the face value approach should reach the same practical result as those adopting the economic value approach.¹⁰⁷ Section II.B argues that the reason some courts *1544 think the choice between the face value approach and the economic value approach provides different results is because those adopting the economic value approach also interpret “greater than” to mean “equal to or greater than” (the modified economic value approach).¹⁰⁸ In doing so, courts rewrite § 363(f)(3), substituting their own judgment for the explicit boundaries established by Congress without support in the plain language of the statute, the legislative history, or the context of the provision.

A. The Strict Textual Approach: Face Value and Economic Value Produce the Same Result

As a practical matter, both the face value approach and the economic value approach produce the same result. The unambiguous language in § 363(f)(3) requires the property to be sold for an amount “greater than” the value-- whether the face value or the economic value--of the lien.¹⁰⁹ As a result, the difference between the two interpretations is insignificant. Figure 1 helps make this proposition clear.

Figure 1

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	Face Value of Lien	Sale Price of Underlying Asset	Section 363(f)(3) "Value" of Lien	Availability of § 363(f)(3)
Face Value	\$100	\$110	\$110	Yes
Approach	\$100	\$90	\$100	No
Economic Value	\$100	\$110	\$100	Yes
Approach	\$100	\$90	\$90	No

The face value of a lien is easy enough to determine; it is simply the amount of the lien. The economic value of a lien is the lesser of the face value of the lien and the economic value of the property securing the lien.¹¹⁰ The economic value of the property securing the lien is equal to what "a seller is willing to accept and a buyer is willing to pay"¹¹¹ --in other words, the sale price of that property.¹¹² It is the lesser of the two because the amount a lienholder stands to recover can fall below the lien's face value but cannot rise above it; the lienholder will never stand to recover more than the face value of the lien. In Figure 1, the face value of the lien is \$100 and the *1545 sale price of the property securing the lien is either \$90 (meaning the lien is underwater) or \$110 (meaning the lien is above water).

Applying the face value approach, the property supporting the above-water lien could be sold if its sale price is \$110, because that sale price would be "greater than" the \$100 face value of the lien. However, the property supporting the underwater lien could not be sold, because its \$90 sale price would be less than, not "greater than," the \$100 face value of the lien. Thus, § 363(f)(3) provides no relief for property securing an underwater lien, because such property cannot be sold for an amount "greater than the [face value] of [the lien]."¹¹³

Applying the economic value approach, the property supporting the above-water lien could be sold if its sale price is \$110, because the sale price would be "greater than" the \$100 economic value of the lien. However, the property supporting the underwater lien could not be sold, because its \$90 sale price would be equal to, not "greater than," the \$90 economic value of the lien. Like the face value approach, the economic value approach provides no relief for the sale of property securing an underwater lien, because such property cannot be sold for an amount "greater than the [economic value] of [the lien]."¹¹⁴ Therefore, neither approach permits the sale of property subject to an underwater lien and both approaches permit the sale of property subject to a lien that is not underwater.¹¹⁵

B. "Greater than" Is Unambiguous

The choice between the face value approach and the economic value approach matters only because courts adopting the economic value approach have erroneously, and without any rational explanation, interpreted "greater than" to mean "equal to or greater than."¹¹⁶ When courts adopt that interpretation, the choice between the face value approach and the economic value approach takes on new significance. This seemingly radical interpretation of unambiguous language is contrary to the plain meaning of the statute and *1546 the statute's legislative history,¹¹⁷ ignores the context of § 363(f)(3),¹¹⁸ and expands the reach of the statute to provide courts with carte blanche to extinguish a creditor's lien merely because the court thinks it is a good idea.

On the one hand, the face value approach's analysis remains the same using the "equal to or greater than" interpretation: § 363(f)(3) is inapplicable to sales of property securing underwater liens and permits sales of property securing above-water liens. Applying the facts from Figure 1, the property supporting the above-water lien could be sold because its \$110 sale price would be "equal to or greater than" the \$100 face value of the lien. However, the property supporting the underwater lien could not be sold because its \$90 sale price would be less than, not "equal to or greater than," the \$100 face value of the lien. Thus, § 363(f)(3) provides no relief for property securing an underwater lien, because such property cannot be sold for an amount "[equal to or] greater than the [face value] of [the lien]."¹¹⁹

The economic value approach, on the other hand, becomes all encompassing, because (i) the sale price of property securing an above-water lien is generally greater than the economic value of the lien, and (ii) the sale price of property securing an underwater lien is generally equal to the economic value of the lien. Using the facts from Figure 1, the property supporting the above-water lien could be sold because its \$110 sale price would be “equal to or greater than” the \$100 economic value of the lien. Likewise, the property supporting the underwater lien could be sold because its \$90 sale price would be “equal to or greater than” the \$90 economic value of the lien. Thus, when the economic value approach is used in concert with the “equal to or greater than” interpretation, virtually every sale of property will meet the condition in § 363(f)(3): the sale price will almost certainly be for an amount “equal to [where the lien is underwater] or greater than [where the lien is not underwater]” the economic value of the lien on the property.

The phrase “greater than” is plain on its face and not at all ambiguous. In order to interpret a statute to mean something other than what it seems to say--here, that the property must be sold for “greater than” the value of the lien--there must be some ambiguity in the provision as written.¹²⁰ Courts interpreting “greater than” to mean “equal to or greater than” fail to “give effect to the express language of the statute.”¹²¹ Where Congress intends to *1547 say “equal to or greater than,” it does so explicitly.¹²² For example, § 363(b) clearly represents a grant to the courts of wide discretion to consider “the facts, circumstances and conditions” in deciding whether to permit a sale of property not subject to a lien outside of the ordinary course. Like § 363(f), § 363(b)(2)(B) is not subject to the Chapter 11 Safeguards. In fact, § 363(b)(2)(B) is a provision through which § 363(f)(3) directly operates, governing the underlying sale in which § 363(f) would be employed to release liens and encumbrances.¹²³

Lack of ambiguity notwithstanding, the leading case that applies the economic value approach, *In re Beker*, inexplicably concluded that “§ 363(f)(3) is to be interpreted to mean what it says: the price must be equal to or greater than the aggregate value of the liens asserted against it, not their amount” in order to permit the sale of property securing an underwater lien.¹²⁴ The statement is self-defeating: it argues against an interpretation of “value” to mean “face value” because it directly conflicts with the plain language of the statute, and then it substitutes “equal to or greater than” for the statute’s plain language.¹²⁵ Ironically, the *In re Beker* court went on to say in the next paragraph that “[b]road statements to the contrary, made without any analysis . . . are no reason for not following the language of the statute.”¹²⁶ Adopting a slightly more nuanced--although substantially more erroneous--analysis, *In re Terrace Gardens Park Partnership* justified its use of the economic value approach by holding that the property at issue was actually being sold for more than its economic value.¹²⁷ *In re Terrace Gardens Park Partnership*’s holding directly contradicts the widely accepted meaning of economic value; you cannot sell property for more than what a third party buyer is willing to pay.¹²⁸

Because virtually every sale of property will be for an amount “equal to or greater than” what “a seller is willing to accept and a buyer is willing to pay” (i.e., the economic value of the lien),¹²⁹ courts adopting the “equal to or greater than” language effectively interpret § 363(f)(3) to provide carte blanche to extinguish a creditor’s lien merely because the court thinks it is a good idea.¹³⁰ For example, *In re Terrace Gardens Park Partnership* conjured *1548 up the authority to permit a 363(f) Sale “after examination of the surrounding circumstances and a finding by the court that those circumstances justif[ied] the sale.”¹³¹ *In re Collins* wrote the entire provision out of the Code, holding that when the price is equal to the aggregate value of the liens, “courts must address these types of sales on a case by case basis, and give judicial consent only after the surrounding circumstances are carefully scrutinized and a determination is made that the sale is justified.”¹³² Similarly, *In re WBQ Partnership* held “the best price obtainable under the circumstances” to be sufficient.¹³³

Such broad interpretations are inconsistent with the limited scope of § 363(f).¹³⁴ Section 363(b), through which § 363(f) operates, is already subject to the court's discretion.¹³⁵ If Congress intended to subject § 363(f) only to that same limitation, there would be no need to include five specific circumstances where § 363(f) should apply. Thus, if § 363(f)(3) were interpreted to give the courts *carte blanche*, it would not only write the other four provisions of § 363(f) out of the Code, it would write itself out of the Code.¹³⁶

Properly understood, each provision of § 363(f) addresses a narrow and targeted circumstance in which the court may extinguish a lien prior to Chapter 11 plan confirmation. Section 363(f)(3) describes a narrow circumstance in which debtors may do what they ordinarily may not--sell property free of liens, prior to plan confirmation, and without the Chapter 11 Safeguards--when the lien no longer serves a purpose, and the creditor is no worse off without it.¹³⁷ When the underlying property is being sold for a price that allows the creditor to be fully repaid, restricting the creditor's lien to the proceeds of the property sale, as opposed to the proceeds of the property sale and the property itself, should be of no moment--the creditor is fully repaid and should be indifferent to whether the sale occurs. In contrast, the modified economic value approach offers absolutely no protection to the creditor at all; a court could permit a sale of property, free of all liens, even to the great prejudice of the creditor. While it may be possible--maybe even likely--that courts are able to protect secured creditors' rights without the *1549 Chapter 11 Safeguards in 363(b) Sales,¹³⁸ Congress clearly did not give them this power. By effectively limiting application of § 363(f)(3) to the sale of property securing a lien only when the lien is not underwater,¹³⁹ Congress confined § 363(f)(3) to instances in which the creditor is demonstrably no worse off as a result of the sale.

Many courts adopting the modified economic value approach do so in part because they believe it better serves the underlying purpose of the Code. For example, *In re Terrace Gardens Park Partnership* argued that “[i]t makes no sense to read into Section 363(f)(3) a restriction inconsistent” with the Code’s “focus on protecting the value of collateral” just because the sale is free of liens.¹⁴⁰ However, this statement reflects a mistaken view of § 363(f) generally and of § 363(f)(3) specifically. First, the “restriction” is not a restriction at all; § 363(f) expands, rather than restricts, what the debtor can do.¹⁴¹ The status quo is the standard plan confirmation, and § 363(f)(3) is properly viewed as an expansion of those rights in a narrow set of circumstances. Second, the “restriction” is not being “read into Section 363(f)(3)”--it is expressly stated.¹⁴² Third, that the “sale is free of liens” is a perfectly legitimate reason for restricting this exception to the status quo. A sale free of all liens strips the secured creditor of an important right, and, where the lien continues to serve a purpose, imposing restrictions on when the court can use this extraordinary power to release the lien seems perfectly reasonable. One court’s concern that “an undersecured creditor [could] obstinately block an otherwise sensible sale”¹⁴³ is correct but misses the point: Congress made the judgment to enact that rule. Where Congress has clearly chosen strict parameters instead of granting judicial discretion, courts should abide by the instructions they have been given.

***1550 Conclusion**

The strict textual approach advocated by this Note resolves the disagreement as to whether § 363(f)(3) refers to the face value or the economic value of the liens on the property. Properly understood, § 363(f)(3) does not permit a 363(f) Sale of property securing an underwater lien, irrespective of whether the face value approach or the economic value approach is the correct interpretation of “aggregative value of all liens.”¹⁴⁴ Courts adopting a modified version of the economic value approach to permit 363(f) Sales of property securing underwater liens ignore the plain language of the statute by interpreting “greater than” to mean “equal to or greater than.” In doing so, courts adopting this approach cast aside Congress’s will by effectively writing § 363(f)(3) out of the Code and replacing it with their own discretion. While it is true that Congress’s narrow drafting of § 363(f)(3) might allow--in fact, probably will allow--creditors to behave in imperfect ways, and courts are more than capable of

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protecting creditors' rights in the absence of the Chapter 11 Safeguards, “policy reasons cannot defeat the plain language of the statute.”¹⁴⁵ The fact remains that Congress deliberately placed § 363(f) into the Code.

Further, § 363(f)(3)'s narrow language is not as out of place in the Code as its critics contend. Section 363(f) is an alternative to the standard Chapter 11 plan confirmation process. In a very narrow set of circumstances, it allows debtors, at the debtor's option, to elect an express route to the effect of plan confirmation, without the many Chapter 11 Safeguards to which they would otherwise be subject. Because § 363(f)(3) operates in an entirely different context than the rest of Chapter 11, broad interpretations of provisions in the latter are not necessarily analogous to the former.

Footnotes

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¹ U.S. Const. art I, §8.

² [Pub. L. No. 95-598, 92 Stat. 2549](#) (codified as amended throughout 11 U.S.C.). This is the fifth bankruptcy statute enacted by Congress, the first of which was passed in 1898 and is sometimes referred to as the Nelson Act. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (formerly codified throughout 11 U.S.C.). The Code completely replaced its predecessor, the Chandler Act, ch. 575, 52 Stat. 883 (1938) (formerly codified throughout 11 U.S.C.), and has been amended numerous times, most recently in 2005 through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), [Pub. L. No. 109-8](#), sec. 1(II)(A), §204, sec. 1(II)(C), §231(a), sec. 1(XII), §1221(a), 119 Stat. 49, 72, 195.

³ This Note uses the terms “company” and “debtor” interchangeably.

⁴ See *infra* Section I.A for a discussion of the various Chapter 11 safeguards.

⁵ [11 U.S.C. §363\(c\)](#) (2006).

⁶ See *id.* [§363\(b\)](#).

⁷ See, e.g., *id.* §§1121-29.

⁸ *Id.* [§363\(b\)](#).

⁹ See *infra* Section I.B for a more detailed description of [§363\(b\)](#) Sales.

¹⁰ See *infra* Section I.B for a discussion of judicially imposed safeguards. Legislatively imposed safeguards include the notice and hearing requirements in [§363\(b\)\(1\)](#) and the credit bidding provisions in [§363\(k\)](#) (allowing the purchaser of property to offset creditor claims on that property against the purchase price). See [11 U.S.C. §363\(b\)\(1\), \(k\)](#).

¹¹ Pursuant to the Uniform Commercial Code (“UCC”), for example, “a security interest is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.” [U.C.C. §9-201\(a\)](#) (2000). Similarly, a security interest continues in the proceeds of the disposed property. *Id.* §9-315(a)(2). However, the creditor's claim can only be satisfied once; if the creditor recovers in full from one lien, the other is extinguished. *Id.* §9-315 cmt. 2,9-325.

¹² See [11 U.S.C. §363\(b\)-\(c\)](#).

¹³ See *id.* [§§363\(b\), \(f\), 1123\(a\)\(5\)\(D\), 1141\(c\)](#).

¹⁴ See *id.* [§§1123\(a\)\(5\)\(D\), 1141\(c\)](#); *infra* Section I.A.

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- 15 11 U.S.C. §363(b), (f); accord 3 Collier on Bankruptcy P363.06 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) (“The Code makes no material change to the cases decided under the Bankruptcy Act on sales free and clear of liens but clarifies that other grounds for a sale free and clear may also exist.”); *infra* Section I.C.
- 16 See 11 U.S.C. §§363(b), (f), 1123(a)(5)(D), 1141(c).
- 17 *Id.* §363(f); see also *infra* Section I.C.
- 18 11 U.S.C. §363(f)(3).
- 19 See *infra* Section I.D.
- 20 See *infra* Section II.A.
- 21 A lien is underwater where the face value of the lien exceeds the fair market value of the property securing it.
- 22 See *infra* notes 49-54 and accompanying text.
- 23 See *infra* note 52 and accompanying text.
- 24 See *In re Chrysler LLC*, 405 B.R. 84, 96 (Bankr. S.D.N.Y.) (approving a 363(b) Sale where the property comprised the entire company), *aff’d*, 576 F.3d 108 (2d Cir.), *vacated*, 130 S. Ct. 1015 (2009).
- 25 A “going concern” is a “commercial enterprise actively engaging in business with the expectation of indefinite continuance.” Black’s Law Dictionary 760 (9th ed. 2009).
- 26 For example, the debtor has the exclusive right to propose a plan for the first four months after filing. 11 U.S.C. §1121 (2006).
- 27 See *id.* §362.
- 28 See *id.* §1123.
- 29 See *id.* §1104 (permitting the appointment of a trustee or examiner in certain circumstances); *id.* §1106 (enumerating the trustee’s or examiner’s duties); *id.* §1107 (granting the debtor in possession rights similar to those of a trustee); *id.* §1108 (authorizing the trustee to operate the business). This Note uses the term “trustee” to refer to either a trustee appointed pursuant to §1104 or the debtor performing the trustee’s functions pursuant to §1107.
- 30 See *id.* §§1106-1108.
- 31 See *id.*
- 32 Compare *id.* §363(c) (sale of assets within the ordinary course), with *id.* §363(b) (sale of assets outside of the ordinary course).
- 33 See, e.g., *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1069 (2d Cir. 1983).
- 34 11 U.S.C. §1121 (subject to certain exceptions).
- 35 *Id.* §§1122-23.
- 36 *Id.* §1122.
- 37 *Id.* §1124. In general, a class is impaired if its rights are altered by the plan. *Id.*
- 38 *Id.* §1123(a).
- 39 Each holder of a claim must be provided with a summary of the plan proposed and a disclosure statement sufficient to enable “a hypothetical investor of the relevant class to make an informed judgment about the plan.” *Id.* §1125.

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- 40 Notice must be provided before a confirmation hearing is held. Id. §1128(a).
- 41 A class of claims has accepted the plan if it is accepted by creditors representing at least two-thirds of the amount and more than one-half of the number of allowed claims. Id. §1126(c). Impaired classes that have not accepted the plan are then subjected to cram-down under §1129(b), whereby the court will allocate any remaining value to the senior-most claims first, and then to each subordinate claim in the order of their priority. Id. §1129(b). Notwithstanding the operation of §1129(b), if a class of claims is impaired under the plan, at least one impaired class must accept the plan. Id. §1129(a)(10).
- 42 See id. §1129(a)(7) (mandating that no class may receive less under the plan, without the class's consent, than it would if the company was to liquidate).
- 43 Generally, the debtor cannot cram down an unsecured impaired class under §1129(b) if a junior-ranking class of unsecured claims is receiving any value while the rejecting unsecured class remains impaired. See id. §1129(b)(2)(B).
- 44 See [Pension Benefit Guar. Corp. v. Braniff Airways, Inc. \(In re Braniff Airways, Inc.\)](#), 700 F.2d 935, 940 (5th Cir. 1983).
- 45 11 U.S.C. §§1123(a)(5)(D), 1141(c).
- 46 Mark J. Roe & David Skeel, [Assessing the Chrysler Bankruptcy](#), 108 Mich. L. Rev. 727, 737 (2010). For example, imagine a powerful creditor with a \$1,000 senior lien on an asset worth \$2,000. Since the creditor's claim would be satisfied by a sale price of only \$1,000, the creditor might pressure the debtor to sell the asset as quickly as possible, even if the sale price is less than its \$2,000 fair market value.
- 47 11 U.S.C. §363(b).
- 48 Compare the Chapter 11 Safeguards discussed in Section I.A, supra, with the protections described in this Section.
- 49 Even before reorganizations were introduced, courts authorized such sales in the liquidation context where “the asset was physically perishable, or liable to deteriorate or depreciate in price and value” as early as 1867. [In re Chrysler LLC](#), 405 B.R. 84, 94 (Bankr. S.D.N.Y.) (citing [Comm. of Equity Sec. Holders v. Lionel Corp. \(In re Lionel Corp.\)](#), 722 F.2d 1063, 1067 (2d Cir. 1983)), *aff'd*, 576 F.3d 108 (2d Cir.), *vacated*, 130 S. Ct. 1015 (2009); accord [In re Pedlow](#), 209 F. 841, 842 (2d Cir. 1913) (“[C]oncept of ‘perishable’ was not limited to its physical meaning, but also included property liable to deteriorate in price and value.”). When reorganizations were finally introduced in the Chandler Act, ch. 575, 52 Stat. 883 (1938) (formerly codified throughout 11 U.S.C.), such sales were permitted where prompt action was required in order to avoid jeopardizing the estate's assets. See, e.g., [In re Pure Penn Petroleum Co.](#), 188 F.2d 851, 854 (2d Cir. 1951) (holding that the debtor must plead and prove “the existence of an emergency involving imminent danger of loss of the assets”); [In re Solar Mfg. Corp.](#), 176 F.2d 493, 494 (3d Cir. 1949) (concluding that preconfirmation sales should be “confined to emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken”).
- 50 See [In re Lionel](#), 722 F.2d at 1066-68.
- 51 See, e.g., [In re Chrysler](#), 405 B.R. at 96 (approving a 363(b) Sale where the property comprised the entire company); Douglas G. Baird & Robert K. Rasmussen, [Chapter 11 at Twilight](#), 56 Stan. L. Rev. 673 (2003); Douglas G. Baird, [The New Face of Chapter 11](#), 12 Am. Bankr. Inst. L. Rev. 69, 73 (2004) [hereinafter Baird, *The New Face*].
- 52 Baird, *The New Face*, supra note 51, at 73.
- 53 Recently (and famously), the [In re Chrysler](#) court approved a 363(b) Sale of the entire company largely because the debtor established what the court considered “a good business reason.” [In re Chrysler](#), 405 B.R. at 96 (citing [In re Lionel](#), 722 F.2d at 1069 (holding where a favorable business opportunity is presented and is only available if acted upon quickly, the court has the ability to authorize the sale if it is in the best interest of the estate)).
- 54 [In re Lionel](#), 722 F.2d at 1069.

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- 55 Id. *In re Lionel* points to several cases evidencing “the continuing vitality under the old law of an ‘emergency’ or ‘perishability’ standard.” Id. at 1068-69 (citing *Fin. Assocs. v. Loeffler (In re Equity Funding Corp. of Am.)*, 492 F.2d 793, 794 (9th Cir. 1974) (upholding the trial court’s finding that because the market value of an asset was likely to deteriorate substantially in the near future, a sale was in the estate’s best interests); *Int’l Bank of Miami v. Brock (In re Dania Corp.)*, 400 F.2d 833, 835-37 (5th Cir. 1968) (upholding the sale of stock representing the debtor’s major asset where its value was rapidly deteriorating, causing the reorganizing estate to diminish); and *Marathon Foundry & Machine Co. v. Schwartz (In re Marathon Foundry & Machine Co.)*, 228 F.2d 594 (7th Cir. 1955) (heavy interest charges justified the sale of stock that had been pledged to secure a loan)); accord *In re Pedlow*, 209 F. 841, 842 (2d Cir. 1913) (finding that the concept of perishability included “property liable to deteriorate in price and value”).
- 56 *In re Lionel*, 722 F.2d at 1069.
- 57 Id. at 1069-71 (reviewing the plain language and the legislative history). For the relevant factors in finding a “reasonable business purpose” articulated by the *Lionel* court, see *infra* note 73 and accompanying text.
- 58 *Institutional Creditors of Cont’l Air Lines, Inc. v. Cont’l Air Lines, Inc. (In re Cont’l Air Lines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1986).
- 59 *Roe & Skeel*, *supra* note 46, at 737.
- 60 See, e.g., James J. White, *Bankruptcy Noir*, 106 Mich L. Rev. 691 (2008) (arguing that 363(b) Sales do provide better returns than those that are likely to be had in Chapter 11 by a full reorganization). But see Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 Mich L. Rev. 1, 24-27 (2007) (arguing that the bankrupt debtor realizes lower sales prices on its assets in a 363(b) Sale relative to the payoff to be had in Chapter 11 by a full reorganization). See generally *Roe & Skeel*, *supra* note 46, at 735 (acknowledging the opposing arguments regarding the extent to which 363(b) Sales are more profitable than the returns sellers realize through Chapter 11 reorganizations).
- 61 *Roe & Skeel*, *supra* note 46, at 735-36.
- 62 See, e.g., *In re Cont’l Air Lines*, 780 F.2d at 1228 (“[I]f a debtor were allowed to reorganize ... in some fundamental fashion [in a 363(b) Sale], creditor’s [Chapter 11] rights ... might become meaningless.”); *In re Terrace Gardens Park P’ship*, 96 B.R. 707, 715 (Bankr. W.D. Tex. 1989) (“[A] debtor should not be permitted to use [a 363(b) Sale] to ‘cash out’ a creditor, depriving the creditor of its [Chapter 11 Safeguards].”).
- 63 See, e.g., *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983).
- 64 See, e.g., *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 298 (5th Cir. 1984) (“[A] bankruptcy court abuses its discretion in approving a [preplan] settlement with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors.”).
- 65 11 U.S.C. §1129(b)(2)(B)(ii) (2006).
- 66 See, e.g., *In re Braniff Airways*, 700 F.2d at 940 (striking down a proposed sale where “little would remain save fixed based equipment and little prospect or occasion for further reorganization,” because the court viewed the plan as a *de facto* reorganization).
- 67 *Clyde Bergemann, Inc. v. Babcock & Wilcox Co. (In re Babcock & Wilcox Co.)*, 250 F.3d 955, 960 (5th Cir. 2001) (citing *In re Braniff Airways*, 700 F.2d at 940).
- 68 See *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 464 (2d Cir. 2007).
- 69 The fair and equitable standard is derived from the §1129(b)(2)(B)(ii) cram-down provisions applicable under a normal Chapter 11 plan confirmation process. Id. at 462.
- 70 See id. at 464-65.

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- 71 [Id.](#) at 464-65.
- 72 [In re Chrysler LLC](#), 576 F.3d 108, 117 (2d Cir.), vacated, 130 S. Ct. 1015 (2009).
- 73 [Comm. of Equity Sec. Holders v. Lionel Corp. \(In re Lionel Corp.\)](#), 722 F.2d 1063, 1071 (2d Cir. 1983).
- 74 See 11 U.S.C. §§1123(a)(5)(D), 1141(c) (2006); [supra](#) Section I.A.
- 75 Section 363(f) simply codifies existing common law principles permitting courts to authorize the sale of property outside of the ordinary course, free and clear of any interest, prior to the standard Chapter 11 plan confirmation process. 3 Collier On Bankruptcy, [supra](#) note 15, P363.06 (“The Code makes no material change to the cases decided under the Bankruptcy Act on sales free and clear of liens but clarifies that other grounds for a sale free and clear may also exist.”).
- 76 See [supra](#) Section I.A.
- 77 11 U.S.C. §363(f).
- 78 See George W. Kuney, [Misinterpreting Bankruptcy Code Section 363\(f\) and Undermining the Chapter 11 Process](#), 76 Am. Bankr. L.J. 235, 244 (2002).
- 79 See [id.](#) at 245.
- 80 [Id.](#) at 247-48. For a more detailed discussion of §363(f)(4), see [id.](#) at 249-51 (identifying points of contention in the interpretation of §363(f)(4), which are outside the scope of this Note).
- 81 [Id.](#) at 251-52. A broadly accepted nonbankruptcy proceeding includes one where a lienholder can be forced to accept a monetary satisfaction through the process of foreclosure. See [id.](#) There are several problems with the clause’s phrasing, particularly the possibility that a plain reading of §363(f)(5) would swallow the other four provisions, which are outside the scope of this Note. For a more detailed discussion of §363(f)(5), see generally [id.](#) at 251-57.
- 82 [Id.](#) at 245 (“[L]iens exist to secure payment; if the payment is made, there is no need for the liens.”).
- 83 11 U.S.C. §363(f)(3) (2006).
- 84 If a lien with a face value of \$100 were secured by property that is worth \$90, the face value of the lien would be \$100, while the economic value would be \$90. For a more detailed illustration of the two approaches, see [infra](#) Figure 1 and accompanying text. For one of the leading cases adopting the face value approach, see [Clear Channel Outdoor, Inc. v. Knupfer \(In re PW, LLC\)](#), 391 B.R. 25, 40-41 (B.A.P. 9th Cir. 2008). See also [Criimi Mae Servs., Ltd. P’ship v. WDH Howell, LLC \(In re WDH Howell, LLC\)](#), 298 B.R. 527, 534 (Bankr. D.N.J. 2003) (holding that the debtor in possession cannot sell the collateral free and clear of all liens under §363(f)(3) “unless the sale price is greater than the aggregate face value of all liens on the property”); [In re LLC Financial Corp., No. 02-12846-MWV](#), 2002 WL 33894816, at *3 (Bankr. D.N.H. Dec. 10, 2002) (agreeing with [In re Perroncello](#)); [In re Perroncello](#), 170 B.R. 189, 191-92 (Bankr. D. Mass. 1994) (following Scherer); [Scherer v. Fed. Nat’l Mortg. Ass’n \(In re Terrace Chalet Apartments, Ltd.\)](#), 159 B.R. 821, 827-28 (Bankr. N.D. Ill. 1993) (refusing to follow [In re Beker](#)); [In re Gen. Bearing Corp.](#), 136 B.R. 361, 366-67 (Bankr. S.D.N.Y. 1992) (noting that the debtor failed to produce evidence that the sale price was greater than the aggregate value of all the liens on the collateral); [Richardson v. Pitt Cnty. \(In re Stroud Wholesale, Inc.\)](#), 47 B.R. 999, 1001-02 (Bankr. E.D.N.C. 1985) (holding statutory “aggregate value of all liens” means the full amount of all debt secured by the liens, and noting the alternative would violate “the well-established rule that the bankruptcy court should not order the sale of property free and clear of interests and liens unless the court is satisfied that the sale proceeds will fully compensate the secured lienholders and produce some equity for the estate”), [aff’d](#), 983 F.2d 1057 (4th Cir. 1986). For the leading case adopting the economic value approach, see [In re Beker Indus. Corp.](#), 63 B.R. 474, 475-76 (Bankr. S.D.N.Y. 1986) (statutory “aggregate value of all liens” means the actual economic value of the lien). See also [In re Collins](#), 180 B.R. 447, 450 (Bankr. E.D. Va. 1995); [WBQ P’ship v. Va. Dep’t of Med. Assistance Servs. \(In re WBQ P’ship\)](#), 189 B.R. 97, 105-06 (Bankr. E.D. Va. 1995); [In re Long Point Road Ltd. P’ship](#), No. 93-72769-W, 1996 WL 33340783, at *2 (Bankr. D.S.C. June 5, 1996); [Milford Grp., Inc. v. Concrete Step Units, Inc. \(In re Milford Grp., Inc.\)](#), 150 B.R. 904, 906 (Bankr. M.D. Pa. 1992); [In re WPRV-TV, Inc.](#), 143 B.R. 315, 320 (D.P.R. 1991), vacated, 165 B.R. 1 (D.P.R. 1992), modified,

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983 F.2d 336 (1st Cir. 1993); *In re Oneida Lake Dev., Inc.*, 114 B.R. 352, 356-57 (Bankr. N.D.N.Y. 1990); *In re Terrace Gardens Park P'ship*, 96 B.R. 707, 712-13 (Bankr. W.D. Tex. 1989).

85 *Knupfer*, 391 B.R. at 41 (“[Section]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 Seventh Circuit has signaled a principled preference for the face value approach as well, albeit in a different context and only in dicta: “As a general rule, the bankruptcy court should not order property sold ‘free and clear of’ liens unless the court is satisfied that the sale proceeds will fully compensate secured lienholders and produce some equity for the benefit of the bankrupt's estate.” *In re Riverside Inv. P'ship*, 674 F.2d 634, 640 (7th Cir. 1982) (emphasis omitted) (citing *Freeman Furniture Factories, Inc. v. Bowlds* (*In re Ames Corp.*), 136 F.2d 136, 140 (6th Cir. 1943); *Hoehn v. McIntosh*, 110 F.2d 199, 202 (6th Cir. 1940); *In re Unikraft Homes of Va., Inc.*, 370 F. Supp. 667, 670-71 (W.D. Va. 1974); and *In re Bernhard Altmann Int'l Corp.*, 226 F. Supp. 201, 205-06 (S.D.N.Y. 1963)). On the other hand, in affirming *Richardson*, 47 B.R. 999, the Fourth Circuit indicated a possible preference for the economic value approach: “While we do not necessarily agree with all that was said in the opinion of the district court in [adopting the face value approach], we think that the district court reached a correct, proper and equitable result.” *Richardson v. Pitt Cnty.* (*In re Stroud Wholesale, Inc.*), No. 85-1422, 1986 WL 181749, at *1 (4th Cir. Jan. 21, 1986).

86 See supra note 84.

87 See *Knupfer*, 391 B.R. at 40 (citing 11 U.S.C. §§361, 506(a), 1129(a)(7)(B)).

88 *Id.* at 39. This raises the question of whether “the unusual construction should be given special interpretive significance.” *Id.* at 38.

89 See, e.g., 11 U.S.C. §§501, 502, 1129(b)(2) (addressing the filing of proofs of claims or interest, allowance of claims or interests, and the requirements necessary for a plan to be considered fair and equitable with respect to a class).

90 See infra notes 99-101 and accompanying text.

91 See *Knupfer*, 391 B.R. at 38 (“[T]he Supreme Court has acknowledged that even undefined words and phrases in the Bankruptcy Code should presumptively receive the same construction, even if found in different parts of the code.” (citing *Rousey v. Jacoway*, 544 U.S. 320, 326-27 (2005) (determining the definition of the Bankruptcy Code phrase “on account of” by referring to other instances of that phrase in the Code)); *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989) (“[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); *Am. Bankers Ass'n v. Gould*, 412 F.3d 1081, 1086 (9th Cir. 2005) (“Our goal in interpreting a statute is to understand the statute ‘as a symmetrical and coherent regulatory scheme’ and to ‘fit, if possible, all parts into a ... harmonious whole.’”) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)); *In re Beker Indus. Corp.*, 63 B.R. 474, 475 (Bankr. S.D.N.Y. 1986).

92 See, e.g., *In re Collins*, 180 B.R. 447, 450-51 (Bankr. E.D. Va. 1995); *Milford Grp., Inc. v. Concrete Step Units, Inc.* (*In re Milford Grp., Inc.*), 150 B.R. 904, 906 (Bankr. M.D. Pa. 1992); *In re WPRV-TV*, 143 B.R. 315, 320 (D.P.R. 1991), vacated, 165 B.R. 1 (D.P.R. 1992), modified, 983 F.2d 336 (1st Cir. 1993); *In re Oneida Lake Dev., Inc.*, 114 B.R. 352, 356-57 (Bankr. N.D.N.Y. 1990); *In re Terrace Gardens Park P'ship*, 96 B.R. 707, 712 (Bankr. W.D. Tex. 1989); *In re Beker Indus.*, 63 B.R. at 475.

93 See 11 U.S.C. §506(a)(1) (“An allowed claim of a creditor secured by a lien on property ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property.”).

94 *Knupfer*, 391 B.R. at 39-40. However, this “statement would not be true if a creditor could and did make the §1111(b) election to have its allowed secured claim equal its total claim amount, 11 U.S.C. §1111(b), or, in a chapter 13 case, if the hanging paragraph of §1325 applied, 11 U.S.C. §1325(a).” *Id.* at 39 n.14.

95 *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (“The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.”).

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- 96 See *In re Beker Indus.*, 63 B.R. at 475; *In re Collins*, 180 B.R. at 450-01; *In re Milford Grp.*, 150 B.R. at 906; *In re WPRV-TV*, 143 B.R. at 319-21; *In re Oneida Lake Dev.*, 114 B.R. at 356-57; *In re Terrace Gardens*, 96 B.R. at 712-13.
- 97 *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 372 (1988).
- 98 *In re Terrace Gardens*, 96 B.R. at 713.
- 99 This assumes that in the absence of §363(f), courts would generally not exercise their equitable powers pursuant §105 to extinguish liens in 363(b) Sales.
- 100 See, e.g., *Clear Channel Outdoor, Inc. v. Knupfer* (*In re PW, LLC*), 391 B.R. 25, 40 (B.A.P. 9th Cir. 2008) (applying this definition in the face value approach context); *In re Beker Indus.*, 63 B.R. at 476 (applying this definition in the economic value approach context).
- 101 For example, assume Debtor owns property with a fair market value of \$90, Creditor has a \$100 lien on the property, and Debtor will eventually pay out 75 cents for each dollar of unsecured claim. In the absence of that lien, Creditor would be entitled to \$75. In one sense, the economic value of Creditor's lien is \$90, because Creditor's secured position entitles him to \$90. In another sense, the value added by Creditor's lien is only \$15, because Creditor would have been entitled to \$75 of that \$90 even without the lien. While this latter interpretation of the economic value of a lien seems perfectly rational when considered in a vacuum, it makes no sense at all in the context of §363(f)(3). First, it requires an ex post determination of the payout to unsecured creditors, and second, requiring the property be worth \$15 in order for Creditor to invoke §363(f)(3) has no relationship to any apparent purpose of §363(f)(3).
- 102 “The trustee may sell free and clear ... [when] the interest is a lien and the sale price of the property is greater than the amount secured by the lien. H.R. Rep. No. 95-595, at 345 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6302; accord S. Rep. No. 95-989, at 56 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5842.
- 103 E.g., *In re Beker Indus.*, 63 B.R. at 476 (citing H.R. Rep. No. 95-595, at 345 and S. Rep. No. 95-989, at 54).
- 104 E.g., *id.* at 476 (emphasis added) (citing S. Rep. No. 95-989, at 54). Collier on Bankruptcy notes: House and Senate Reports, which described an earlier version of the section that referred to the “amount” rather than the “value” of the liens, state that “[t]he trustee may sell free and clear if ... the sales price of the property is greater than the amount secured by the lien.” 3 Collier on Bankruptcy, supra note 15, P363.06[4] (alterations in original) (quoting H.R. Rep. No. 95-595, at 345 and S. Rep. No. 95-989, at 56).
- 105 See *In re Beker Indus.*, 63 B.R. at 476 (citing S. Rep. No. 95-989, at 54 (discussing the adequate protection afforded a secured creditor under 11 U.S.C. §361)).
- 106 11 U.S.C. §363(f)(3) (2006).
- 107 See supra Section I.D.
- 108 See, e.g., *In re Beker Indus.*, 63 B.R. at 476 (“We thus conclude that §363(f)(3) is to be interpreted to mean what it says: the price must be equal to or greater than the aggregate value of the liens asserted against it, not their amount.”).
- 109 11 U.S.C. §363(f)(3).
- 110 Cf. supra note 101 and accompanying text.
- 111 Black's Law Dictionary, supra note 25, at 1587.
- 112 But see *In re Terrace Gardens Park P'ship*, 96 B.R. 707, 713 (Bankr. W.D. Tex. 1989) (holding that the debtor's property was sold for more than its economic value). This finding directly contradicts the meaning of economic value and is therefore (hopefully) an anomaly. See Black's Law Dictionary, supra note 25, at 1587.
- 113 11 U.S.C. §363(f)(3).

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- 114 Id. This Note assumes that any possible sale would be completed on an arms-length basis.
- 115 It is worth noting, however, that all three approaches prohibit the sale of property securing a lien when the sale price of the property equals the face value of the lien. This is a strange result. Perhaps this was intended to provide an extra element of protection for the secured creditor--a “tie” goes to the secured creditor, if you will--in this unusual context. See *supra* note 99 and *infra* note 141 and the accompanying text for a discussion of this unusual circumstance. But see Adam J. Levitin, [Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime](#), 80 *Am. Bankr. L.J.* 1, 14 (2006) (observing that, in general, the benefit of the doubt should be resolved in favor of the debtor).
- 116 See, e.g., [In re Beker Indus. Corp.](#), 63 B.R. 474, 476 (Bankr. S.D.N.Y. 1986) (“We thus conclude that §363(f)(3) is to be interpreted to mean what it says: the price must be equal to or greater than the aggregate value of the liens asserted against it, not their amount.”). Another court, ignoring the generally accepted definition of economic value, held that the property at issue was actually being sold for more than its economic value. See [In re Terrace Gardens](#), 96 B.R. at 713.
- 117 See *supra* note 102 and accompanying text.
- 118 See *supra* notes 99-101 and accompanying text.
- 119 11 U.S.C. §363(f)(3) (2006).
- 120 The general rule of statutory interpretation is that the “legislature says in a statute what it means.” [Conn. Nat'l Bank v. Germain](#), 503 U.S. 249, 254 (1992). “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Id.* (quoting [Rubin v. United States](#), 449 U.S. 424, 430 (1981)).
- 121 [In re Terrace Gardens](#), 96 B.R. at 713 (acknowledging that its approach fails to “give effect to the express language of the statute, which calls for the price to exceed the aggregate value of all liens on the property” before adopting the economic value approach (emphasis omitted)).
- 122 See, for example, 11 U.S.C. §1129(a)(7)(A)(ii), (a)(7)(B), (a)(15)(A), illustrating Congress's familiarity with “not less than.” See, for example, *id.* §1129(a)(10), (b)(2)(A)(II), illustrating Congress's familiarity with “at least.”
- 123 Section 363(f) states: “The trustee may sell property under [§363(b) or (c)] free and clear of any interest in such property of an entity other than the estate” *Id.* §363(f).
- 124 [In re Beker Indus. Corp.](#), 63 B.R. 474, 476 (Bankr. S.D.N.Y. 1986).
- 125 See *id.*
- 126 *Id.*
- 127 96 B.R. 710, 713 (Bankr. W.D. Tex. 1989).
- 128 See, e.g., *Black's Law Dictionary*, *supra* note 25, at 1587. Again, this assumes the sale is at arms-length, and not the subject of any collusion between the parties to the sale.
- 129 See *id.* But see *supra* note 101 and accompanying text.
- 130 See, e.g., [In re Collins](#), 180 B.R. 447, 451 (Bankr. E.D. Va. 1995) (holding that when the price is equal to the aggregate value of the liens, “[c]ase law indicates that courts must address these types of sales on a case by case basis, and give judicial consent only after the surrounding circumstances are carefully scrutinized and a determination is made that the sale is justified”); see also [WBQ P'ship v. Va. Dep't of Med. Assistance Servs. \(In re WBQ P'ship\)](#), 189 B.R. 97, 105 (Bankr. E.D. Va. 1995) (“[W]hen the purchase price equals the value of the lien property, the sale is still permissible under §363(f)(3) if the proposed price is the best obtainable under the circumstances, and if there are ‘special circumstances justifying the sale for less than the amount of the liens.’” (quoting [In re Collins](#), 180 B.R. at 451)).

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- 131 96 B.R. at 713.
- 132 In re Collins, 180 B.R. at 451.
- 133 In re WBQ P'ship, 189 B.R. at 105.
- 134 See supra Section I.C.
- 135 See supra Section I.B.
- 136 See supra Section I.C.
- 137 See supra Section I.C. for an overview of the provisions of §363(f).
- 138 The Fifth Circuit instructs courts to examine the manner in which a proposed sale might deprive objecting parties of their rights and attempt to fashion appropriate protections. *Institutional Creditors of Cont'l Air Lines, Inc. v. Cont'l Air Lines, Inc. (In re Cont'l Air Lines, Inc.)*, 780 F.2d 1223, 1228 (5th Cir. 1986).
- 139 Applying the face value approach, a debtor with property encumbered by a \$100 lien would have to sell the property for \$101--even if the property is only worth one penny--in order to qualify under §363(f)(3). The economic value approach reaches the same result, since the economic value of a \$100 lien on property worth up to \$100 will be equal to, not greater than, the economic value of the property.
- 140 96 B.R. 707, 712-13 (Bankr. W.D. Tex. 1989). By permitting an undersecured creditor to protect itself from an inadequately priced 363(f) Sale by bidding its own claim, §363(k), the economic value approach is more consistent with the Code's adequate protection scheme. See *In re Terrace Gardens*, 96 B.R. at 712-14; *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).
- 141 Again, this assumes that in the absence of §363(f), courts would generally not exercise their equitable powers pursuant to §105 to extinguish liens in 363(b) Sales.
- 142 See 11 U.S.C. §363(f)(3) (2006).
- 143 *In re Terrace Gardens*, 96 B.R. at 712. In re WPRV-TV's reasoning that when special circumstances exist making such a sale desirable, §363(f)(3) is best read to permit the sale, is similarly misguided. See 143 B.R. 315, 319 (D.P.R. 1991), vacated, 165 B.R. 1 (D.P.R. 1992), modified, 983 F.2d 336 (1st Cir. 1993).
- 144 11 U.S.C. §363(f)(3).
- 145 *In re Canonigo*, 276 B.R. 257, 262 (Bankr. N.D. Cal. 2002).

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