



**The Honorable William S. Shulman
Commercial Judges Panel 2012**

*25TH Annual Seminar of the Alabama State Bar Bankruptcy and Commercial Law Section
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.....**RECENT CASES RELATED TO CREDIT BIDDING**

**BANKRUPTCY AT THE BEACH
COMMERCIAL PANEL**

June 2012

- *River Road Hotel Partners, L.L.C. v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011) cert. granted sub nom, *RadLAX Gateway Hotel, L.L.C., et al. v. Amalgamated Bank*, ___ U.S. ___, 132 S.Ct 845, 181 L.Ed.2d 547 (2011)- In their reorganization plans, Debtors proposed to sell encumbered real property free and clear of secured creditors' liens to the highest bidder at auction with the initial bid supplied by debtors' stalking horse. Secured creditors objected to the plan on grounds that the plan violated the requirements of 11 U.S.C. §1129(b)(2)(A)(ii) that secured creditors be allowed to bid their credit at asset auctions. Debtors argued that the plan could be confirmed under 11 U.S.C. §1129(b)(2)(A)(iii) by providing creditors "indubitable equivalent" of their claims. The bankruptcy court ruled that the plan could not be confirmed under §1129(b)(2)(A)(iii), basing its ruling on Judge Ambro's dissent in *In re Philadelphia Newspapers*, 599 F.3d 298 (3rd Cir. 2010). The Seventh Circuit, also persuaded by Judge Ambro's dissent, affirmed the bankruptcy court, holding that a plain-meaning reading of §1129(b)(2)(A)(iii) showed that the section could not be used to confirm plans that propose auctioning off a debtor's encumbered assets free and clear of liens without allowing credit bidding.
- *Hokulani Square, Inc. v. Tamm (In re Hokulani Square, Inc.)*, 460 B.R. 763 (9th Cir. BAP 2011)- Chapter 7 trustee negotiated the sale of the estate's principal asset to the secured creditor by credit bid, subject to overbids. There were no overbids. At the closing, the trustee conveyed the property to the secured creditor free and clear, having applied the credit bid to reduce the amount owing on the lien. The trustee then sought compensation for his work, and included the credit bid as part of the disbursements for the case. The Ninth Circuit BAP held that the credit bid amount could not be included as "moneys disbursed" under 11 U.S.C. §326(a) because credit bids are not a medium of exchange which can be disbursed. The Court found this interpretation consistent with the purpose of 11 U.S.C. §704(a)(1) because it measures the trustee's compensation by the amount of money produced, and not by the value of property that is turned over to secured creditors.
See also *In re BLX Group, Inc.*, 2012 WL 761929 (Bankr. D Mont.) following ruling in *Hokulani*
- *In re Olde Prairie Block Owner, L.L.C.*, 464 B.R. 337 (Bankr. N.D. Ill. 2011)- Secured creditor had liens on two parcels of property. In its plan of reorganization, the Debtor proposed to make a partial cash payment to the secured creditor and pay the remaining claim amount through a plan note, secured by only one of the parcels. The plan was to be funded by cash and non-cash equity contributions leading to the creation of a joint venture by two plan investors. The plan investors were offered a 50% ownership

interest in the “reorganized debtor”. Secured creditor argued that the proposed joint venture would be a new entity because the ownership would change. Because the plan calls for a transfer of control over the Debtor’s property in exchange for value, it amounts to an asset sale, and would therefore have to allow the secured creditor to credit bid under 11 U.S.C. §1129(b)(2)(A)(ii). The bankruptcy court agreed that the transaction was a sale, and the secured creditor must be provided the right to credit bid. The court rejected the Debtor’s argument that the creditor should be restricted from credit bidding “for cause” under 11 U.S.C. §363(k).

- *In re the Merit Group, Inc.*, 464 B.R. 240 (Bankr. D. S.C. 2011)- Debtor sought to sell substantially all of its assets shortly after filing its chapter 11 petition. The unsecured creditor’s committee asserted that a secured creditor’s claim was in question (an issue of whether the claim was debt or equity), and wanted to require the creditor to post collateral in the amount of its credit bid until the sale could be approved by the court. The secured creditor countered that the objection was premature and there was no cause for placing restrictions on its right to credit bid. The court overruled the unsecured creditor committee’s objection, but noted that the ruling did not prejudice the committee’s right to object to approval of the sale. The court also reserved the right to revisit the appropriateness of the credit bid.
- *In re Red Mountain Machinery, Co.*, 451 B.R. 897 (Bankr. D. Ariz. 2011), *aff’d* 2012 WL 1067939 (D. Ariz. March 29, 2012)- Creditor moved for a stay pending the appeal of the court’s order confirming the debtor’s chapter 11 plan. The issue was whether the creditor could make a §1111(b) election when the property has been sold under §363. In holding that the creditor showed no likely success on the merits of the case on appeal, the bankruptcy court noted that the purpose of §1111(b) election is to allow the secured creditor to protect its interest in collateral that might appreciate in value or be worth more than the court determined. The election gives “the lien holder the same ability to realize on the further appreciation of its collateral as it would have if it could make a credit bid for the collateral at a public sale”. *Id.* at 903-04.
- *In re Howard*, 2012 WL 314074 (Bankr. E.D. Tenn)- Bank sought to set aside the sale of two parcels on grounds that there was a misunderstanding between the parties regarding the formulation of the bank’s credit bid at the sale. The bankruptcy court had entered an order authorizing the sale free and clear of the bank’s interest. The bank believed it had a “side agreement” with the debtor which would have allowed to bid less than its full credit. The debtor denied such an agreement. The bankruptcy court refused to set aside the confirmed sale absent fraud, collusion or defects in the conduct of the sale. The bank had the chance to review the court’s order authorizing the sale and there was no ambiguity in the order, or any mention of the side agreement.