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# Can Consent Be Implied in a Sale of Property Free and Clear of Liens Under Section 363(f) of the Bankruptcy Code?

*Michael J. Lichtenstein\**

*A sale under Section 363(f)(2) of the Bankruptcy Code requires the consent of all lienholders. There is a split between courts whether the consent required to sell assets free and clear of liens can be implied. Interestingly, it appears that the majority view is that such consent can be implied so long as a lienholder receives proper notice of the proposed sale. In this article, the author discusses the court split and advises lienholders to pay careful attention to any bankruptcy pleadings identifying any attempt to sell encumbered assets.*

A debtor or trustee can seek to sell property free and clear of all liens in a bankruptcy proceeding only if at least one of five conditions has been satisfied under Section 363(f) of the Bankruptcy Code. One of the conditions is the requirement that a lien holder consent to such sale. Courts have grappled with the question of whether affirmative consent is required or whether consent can be implied by a lien holder's failure to object to a motion seeking to sell the property subject to a lien. Like many other bankruptcy issues, the courts have split on the answer to this question.

## **SECTION 363**

Section 363(b)(1) of the Bankruptcy Code provides that a debtor may sell property of the estate out of the ordinary course of business after "notice and a hearing."<sup>1</sup> "The factors the Court must find for approval of a sale are: (i) a sound business reason justifying the sale, (ii) adequate and reasonable notice of the sale to all parties, (iii) that the sale has been proposed in good faith and (iv) that the purchase price is fair and reasonable."<sup>2</sup> Bankruptcy courts have "wide

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\* Michael J. Lichtenstein is a shareholder in the Litigation and Corporate Department and co-chair of the Bankruptcy and Creditors' Rights Group at Shulman, Rogers, Gandal, Pordy & Ecker, P.A. He may be contacted at [mjl@shulmanrogers.com](mailto:mjl@shulmanrogers.com).

<sup>1</sup> 11 U.S.C. § 363(b)(1).

<sup>2</sup> *In re Siskind* (Bankr. D. Md. July 3, 2008); see also *In re Fisher*, No. 03-1370 (Bankr. D. Md. July 9, 2010) ("In determining whether to approve a proposed sale under section 363, courts generally apply standards that, although stated variously ways, represent essentially a business judgment test. Some courts have described the standard as one of "good faith" or of whether the transaction is 'fair and equitable.' Others question whether the sale is 'in the best interest of the

latitude in approve a sale of assets under § 363(b).”<sup>3</sup>

Section 363(f) of the Bankruptcy Code authorizes the debtor to sell property of the estate under Section 363(b) free and clear of liens and other interests of an entity in such property, *only if*:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;<sup>4</sup>
- (4) such interest is in a bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.<sup>5</sup>

In *In re Delaware & Hudson Railway Co.*,<sup>6</sup> the court stated, “If a trustee wishes to sell assets of a debtor outside of the ordinary course of business of the

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estate.’ In the context of sales of substantially all of the assets of the estate, some courts have required that the price to be paid be ‘fair and reasonable.’” (quoting 3 COLLIER ON BANKRUPTCY ¶ 363.02[1][f] (15th rev. ed. 2005)).

<sup>3</sup> *In re Siskind*; see also *In re Merry-Go-Round Enter.*, 180 F.3d 149, 162 (4th Cir. 1999) (purpose of Chapter 7 is to administer efficiently liquidation of estate for benefit of creditors which requires that trustee have considerable discretion . . . as long as trustee acts reasonably and in best interests of estate and obtains fair value for property, her choice of method of disposition will be respected).

<sup>4</sup> Some courts consider the value of liens to be the face value of such liens. See, e.g., *In re Nance Properties, Inc.*, (Bankr. E.D.N.C., Nov. 8, 2011) (purchase price must exceed face amount of all liens against property); *In re PW, LLC*, 391 B.R. 25, 41 (9th Cir. BAP 2008) (sale price must be more than aggregate amount of claims secured by property). On the other hand, some courts have held that the value of liens refers to the present value of the property. See, e.g., *In re Boston Generating, LLC*, 440 B.R. 302, 332 (S.D.N.Y. 2010) (best evidence of value is the amount of the bid); *In re Collins*, 180 B.R. 447, 450–01 (Bankr. E.D. Va. 1995) (court agreed that property could be sold where price was less than face amount of all liens).

<sup>5</sup> For example, in *In re East Airport Development, LLC*, 443 B.R. 823, 830 (9th Cir. BAP 2011), the 9th Circuit BAP agreed with the bankruptcy court that a pre-petition agreement for release prices was a contractual obligation that could be enforced and so the sale was proper under Section 363(f)(5). *But, see, In re CDKP Development, Inc.*, (Bankr. E.D. N.C., Nov. 30, 2012) (because there was no formal release fee agreement, debtor failed to show how satisfaction of liens could be compelled in legal or equitable proceeding); See also *In re Ricco, Inc.*, (Bankr. N.D. N.V. April 1, 2014) (court approved sale under § 363(f)(5) based on trustee’s argument that cram down under § 1129(b) is a legal or equitable proceeding only which could compel creditor to release lien for less than full amount).

<sup>6</sup> 124 B.R. 169, 175 (D. Del. 1991).

debtor and prior to obtaining a confirmed reorganization plan, the trustee must comply with [S]ection 363.” The court in *Delaware & Hudson Railway* further stated: “At the request of any party with an interest in the property to be sold, the Bankruptcy Court shall prohibit the sale or condition the sale as necessary to provide for adequate protection of the party’s interest” and “[t]he Trustee bears the burden of showing that the sale is adequate.”<sup>7</sup>

## WHAT IS CONSENT UNDER SECTION 363(f)(2)

As noted above, one of the conditions for the sale of property is the lienholder’s consent.<sup>8</sup> In *In re Roberts*,<sup>9</sup> the court stated, “A trustee may sell property of the estate free and clear of a lien if the lienholder consents.<sup>10</sup> The question before the *Roberts* court was whether a lienholder’s consent may be implied if the lienholder does not object to the proposed sale after appropriate notice.<sup>11</sup> The court concluded that the consent required by Section 363(f)(2) may not be implied from the lienholder’s failure to object.<sup>12</sup> The lienholder must actually give its assent.<sup>13</sup> The court in *Roberts* held that the word “consent” when used as a verb, means ‘to give assent or approval.’<sup>14</sup> Consent obligates the trustee to approach the lienholder and secure the lienholder’s assent if the trustee wishes to sell the property free and clear of the lien.<sup>15</sup>

The bankruptcy court in Oregon recently ruled on the issue of whether consent can be implied.<sup>16</sup> The trustee argued that a secured creditor’s failure to object to an asset, after being given notice, should be construed as consent.<sup>17</sup> After reviewing cases on both sides of the issue, the court disagreed with the trustee.<sup>18</sup> The court found more persuasive opinions holding that actual

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<sup>7</sup> *Id.*

<sup>8</sup> 11 U.S.C. § 363(f)(2).

<sup>9</sup> 249 B.R. 152, 153 (Bankr. W.D. Mich. 2000).

<sup>10</sup> 11 U.S.C. § 363(f)(2).

<sup>11</sup> 249 B.R. 152, 153 (Bankr. W.D. Mich. 2000).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 155.

<sup>15</sup> *Id.*

<sup>16</sup> *In re Smith* (Bankr. D. Ore., Feb. 26, 2014).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

consent is required under § 363(f)(2).<sup>19</sup>

In another asset sale opinion, the lienholder had consented pre-petition to certain release prices for its collateral.<sup>20</sup> However, the Ninth Circuit BAP disagreed with the bankruptcy court that this agreement constituted consent under § 363(f)(2).<sup>21</sup> The court provided that the pre-petition release was not given in anticipation of a bankruptcy and the lienholder had filed an objection to the sale.<sup>22</sup> Consent free and clear of liens is required, not merely consent to a sale of assets.<sup>23</sup>

Judge Mayer, an Eastern District of Virginia bankruptcy judge, agreed that consent cannot be implied. In *In re DeCelis*,<sup>24</sup> the trustee sought to sell property free and clear of liens, including the property co-owner's interest. When the co-owner did not respond to the motion to sell, the trustee asserted that his silence meant consent to the sale.<sup>25</sup> The bankruptcy court disagreed and denied the motion.<sup>26</sup>

First, Judge Mayer referred to the *Roberts* court pointing out there was no indication that Congress intended "consent" to have any other meaning than its common interpretation which requires affirmative assent or approval.<sup>27</sup> Additionally, Judge Mayer noted that: "Unless there is a duty to speak, silence signifies nothing. The Bankruptcy Code imposes no duty to respond to notices."<sup>28</sup> In light of the foregoing analysis, Judge Mayer concluded that "consent" requires the trustee to approach a lienholder and to obtain that lienholder's consent of the trustee seeks to sell property free and clear of a lien.<sup>29</sup>

Other courts have taken the opposite position and have deemed that consent

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<sup>19</sup> *Id.*

<sup>20</sup> *In re East Airport Development, LLC*, 443 B.R. 823, 831 (9th Cir. BAP 2011).

<sup>21</sup> *Id.* at 830.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 349 B.R. 465, 466 (Bankr. E.D. Va. 2006). *See also In re Van Stelle*, 354 B.R. 157, 161 (Bankr. W.D. Mich. 2006) (Court could not conclude that secured creditor had given implicit consent).

<sup>25</sup> 349 B.R. at 467.

<sup>26</sup> *Id.* at 466.

<sup>27</sup> *Id.* at 465.

<sup>28</sup> *Id.* at 468. Judge Mayer added: "Had Congress intended silence to be consent in § 363(f)(2), it knew how to say so. It did not." *Id.* at 465.

<sup>29</sup> *Id.*

can be implied. For example, in *In re Arena Media Networks, LLC*,<sup>30</sup> the bankruptcy court entered an order approving a sale of certain assets. The court found that: “A reasonable opportunity to object or be heard with respect to the Sale Motion and the relief requested therein has been afforded to all interested persons and entities . . .” including, but not limited to, lienholders.<sup>31</sup> The court concluded that the debtor had satisfied § 365(f)(2) and held that all lienholders who had failed to object to the sale motion and the relief requested therein were “deemed to have consented pursuant to Sections 363(f)(2) and 365 of the Bankruptcy Code.”<sup>32</sup>

Likewise, in *Futuresource, LLC v. Reuters Ltd.*,<sup>33</sup> the Seventh Circuit held that a bankruptcy court’s sale order extinguished all “interests” in the assets sold under § 363. Plaintiff was made aware of the asset sale and had a copy of the asset purchase agreement, but neither objected to the sale nor challenged the bankruptcy court’s sale order.<sup>34</sup> Regarding satisfaction of the conditions required under § 363(f), the Seventh Circuit opined that the sale extinguished all interests, consistent with § 363(f).<sup>35</sup> Lack of objection (with proper notice) counts as consent.<sup>36</sup> The Seventh Circuit suggested this is the only practical approach because obtaining the consent of anyone who might have an interest in the debtor’s assets would be cost prohibitive.<sup>37</sup>

In *In re Gabel*,<sup>38</sup> a secured creditor filed a motion to annul and set aside a

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<sup>30</sup> Bankr. S.D.N.Y., March 22, 2010.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* See also *In re Way*, (Bankr. N.D Ohio, Sept. 18, 2014) (holding that silence constitutes implied consent that is normally sufficient under § 363(f)(2)). See also *Vista Marketing Group, Ltd.*, (Bankr. N.D. Ill. Mar. 26, 2014) (with notice, lack of objection counts as consent); *In re Wilhoite*, (Bankr. Md. Tenn. May 14, 2014) (debtor waived right to object to sale by Chapter 7 trustee by inaction during trustee’s sale of assets.).

<sup>33</sup> 312 F.3d 281 (7th Cir. 2002).

<sup>34</sup> *Id.* at 284. See also *BAC Home Loans Servicing L.P. v. Grassi*, (1st Cir. BAP, Nov. 21, 2011) (this panel, as well as other courts in this circuit and nationally, views silence as implied consent sufficient to satisfy consent requirements under § 363(f)(2)).

<sup>35</sup> 312 F.3d at 285.

<sup>36</sup> *Id.* See also *In re Tabone*, 175 B.R. 855, 858 (Bankr. D. N.J. 1988) (as township did not object, it could be deemed to have consented to sale for purposes of § 363(f)(2)).

<sup>37</sup> *Id.*

<sup>38</sup> 61 B.R. 661, 662 (Bankr. W.D. La. 1985). See also *In re Borders Group, Inc.*, 453 B.R. 477, 484 (Bankr. S.D. N.Y. 2011) (assets could be sold free and clear of liens when lienholder receives notice of sale and fails to object); *In re Christ Hospital*, 502 B.R. 158, 174 (Bankr. D.N.J. 2013) (*Future Source* provides strongest case for consent based upon failure to object to free and clear sale under § 362(f)(2)).

Chapter 7 trustee's sale of property. Although listed on the creditor matrix, the secured creditor claimed it did not receive notices in the bankruptcy.<sup>39</sup> The judge found first that the secured creditor had received proper notice of the sale.<sup>40</sup> The court found that the presumption that a mailed document (notice of sale) had not been rebutted and therefore notice was proper.<sup>41</sup> As to satisfying the requests of § 363, the court concluded that § 363(f)(2) had been met because no objection was filed.<sup>42</sup> The question was whether a failure to object constituted consent. "My own reading of the law and the jurisprudence in this area leaves me with the firm belief that this is exactly the legal effect that must be given to such a failure to object."<sup>43</sup> In conclusion, the court reiterated that the secured creditor was estopped from denying its implied consent.<sup>44</sup>

## CONCLUSION

A sale under Section 363(f)(2) of the Bankruptcy Code requires the consent of all lienholders. There is a split between courts whether the consent required to sell assets free and clear of liens can be implied. There are several courts that have held that actual consent must be given affirmatively. Interestingly, however, it appears that the majority view is that such consent can be implied so long as a lienholder receives proper notice of the proposed sale. Accordingly, lienholders should pay careful attention to any bankruptcy pleadings identifying any attempt to sell encumbered assets. Silence is likely to be construed as consent to a sale free and clear of liens and encumbrances.

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<sup>39</sup> 61 B.R. at 663.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 664.

<sup>42</sup> *Id.* at 667.

<sup>43</sup> *Id.* Quite a harsh result for a secured creditor which did not object because it claimed it had no notice of the sale.

<sup>44</sup> *Id.* See also *In re Blixseth*, (Bankr. D. Mont. Apr. 20, 2011) ("This Court deems the lack of objection holders of liens and interests, after notice, as their implied consent to the sale free and clear of liens.").