



If you have any questions regarding the matters discussed in this article, please contact the following attorney

Simon Klevansky
1003 Bishop Street
Suite 770
Honolulu, Hawaii 96813
(808)536-0200
sklevansky@kplawhawaii.com

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SALE OF REAL PROPERTY PURSUANT TO SECTION 363 OF THE BANKRUPTCY CODE

The sale of real property pursuant to Section 363 of the Bankruptcy Code in the Bankruptcy Court for the District of Hawaii proceeds much as it does in other jurisdictions. The Court may approve a negotiated sale upon consent of the parties or sufficient evidence that the maximum likely value has been obtained for the benefit of the estate, or the Court may require an overbid procedure. The overbid procedure can range from a simple notice and opportunity to overbid at the hearing to a more substantial procedure, involving a stalking horse bidder, a first stage approval of a breakup fee, and the consideration of other subsequent offers made at a later date, in the case of more substantial assets.

Recent case development in the Ninth Circuit has, however, injected a degree of uncertainty into the process, which may be resolved if and when the Circuit Court considers and determines the issue. In Clear Channel Outdoor, Inc. v. Knupfer, 391 B.R. 25 (9th Cir. BAP 2008), the Bankruptcy Appellate Panel determined that the sale of the estate's property pursuant to Section 363 would not be free of the unpaid junior lien unless the trustee, in seeking the sale, demonstrates how, pursuant to Section 363(f)(5) and applicable state law, satisfaction of the junior creditor's lien by payment of monies could be compelled, and the bankruptcy court has made a finding of the existence of such a mechanism. The Panel remanded the case for further proceedings. Since that time, the Bankruptcy Court for the Western District of Washington, in In re Jolan, Inc., 402 B.R. 866 (Bankr. W.D. Wash. 2009), observed that the Court in Clear Channel had rested its decision on the limited record made below, but had not concluded that no authority existed under state law to compel the junior creditor to accept a money payment in satisfaction of its lien. For its part, the Court in Jolan found that Washington law provided such authority applicable to the sale before it, and accordingly that the Section 363 sale would free the property of any junior liens.



Conventionally both the Debtor and senior secured creditor intend that a Section 363 sale will assure a conveyance free and clear of all liens, as the survival of junior liens would dramatically diminish the amount a buyer will pay for the property. It is not clear that the Ninth Circuit would require the Clear Channel finding, but it would seem prudent to offer evidence that under Hawaii law the junior secured creditors could be compelled to accept monies in satisfaction of the lien, and ask the Court for a finding in the Court's order to that effect. A more exotic "belt and suspenders" remedy is coupling the sale procedure with a stipulated foreclosure of the senior lender's mortgage, so that the junior liens are disposed of under both procedures. Since this latter procedure would require commencement of an adversary proceeding, it is likely to be reserved for cases of substantial value, or where the junior secured creditors object to the sale.

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