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March 2014

So Much for Statutory and Contractual Rights:

Delaware Bankruptcy Court Limits Secured Creditor's Right to Credit Bid to "Foster Competitive Bidding"

In *In re Fisker Auto. Holdings, Inc., et al.*,[1] the U.S. Bankruptcy Court for the District of Delaware capped the right of a secured lender to credit bid its nearly $170 million claim at $25 million — the amount it paid for the debt at an open auction. The primary impetus for the court's limitation on the secured creditor's statutory auction currency appears to have been that, absent such limitation, another bidder would have bowed out of the process, much to the consternation of the Official Committee of Unsecured Creditors. Thus, the court held that "for cause," as used in the limiting language of Section 363(k),[2] allows the derogation of contractual and statutory rights to distributive priority simply to advance the putative interests of an otherwise subordinate class of creditors. Stated differently, rather than to take a holistic view of the benefits the proposed sale would yield to the estate, the court fell victim to the perception that the unsecured creditors are the estate and, in the process, dealt a serious blow to the policy considerations that the Bankruptcy Code is meant to protect.

The Background

Before the *Fisker* Court were competing motions concerning the sale of the debtors' assets. Fisker and its related debtors (collectively, the "Debtors") sought the authority to sell substantially all the Debtors' assets in a private sale. The Committee of Unsecured Creditors (the "Committee") opposed the sale motion and, through its bidding procedures motion, proposed an auction with Wanxiang America Corporation ("Wanxiang") as a competing bidder. The Committee implored the bankruptcy court to deny or cap the right of the secured creditor to credit bid to ensure an auction would take place which, in the view of the Committee, would create value for creditors over and above the bid received from the secured creditor.

Fisker is an American automaker that manufactured one of the world's first production plug-in hybrid electric vehicles. In 2007, the U.S. Department of Energy (the "DOE") provided Fisker with secured financing to bring these cars to market. After Fisker defaulted on the loan, in October 2013, Hybrid Tech Holdings, LLC ("Hybrid") purchased the DOE's position of outstanding principal of nearly $170 million for a purchase price of $25 million, succeeding to the DOE's rights as senior secured lender to the Debtors. A month later, the Debtors filed for Chapter 11 principally for the purpose of effectuating the sale of substantially all of their assets to Hybrid.

> "The ability to credit-bid helps protect a creditor against risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan."
>
> ***RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070 n.2 (2012)**

The Hybrid sale process was set on an extremely expedited basis. Although the court refers to nothing in the record in support of its view, it clearly tagged Hybrid with the acceleration of the sale process and what it perceived as the consequent detriment to the best interests of creditors. The court said, "[i]t is the Court's view that Hybrid's rush to purchase and to persist in such effort is inconsistent with the notions of fairness in the bankruptcy process. The Fisker failure has damaged too many people, companies and taxpayers to permit Hybrid to short-circuit the bankruptcy process."[3] From the tone of the Decision, it is possible that this perception colored the court's thinking.

The bankruptcy court held a hearing on the sale motion and the bidding procedures motion on January 10, 2014. At the commencement of the hearing, the Debtors and the Committee announced a series of stipulated agreements to limit the areas of dispute. The crux of the parties' agreement was that unless Hybrid's right to credit bid was capped at $25 million — if not denied completely — there would be no auction. On the other hand, if Hybrid's right to credit bid was capped, an auction would take place at which Wanxiang would be prepared to bid.[4] In this regard, the parties agreed that:

> [I]f at any auction Hybrid either would have no right to credit bid or its credit bidding were capped at $25 million, there is a strong likelihood that there would be an auction that has a material chance of creating material value *for the estate* over and above the present Hybrid bid.[5]

The Decision

Relying principally on a *dictum* in the split decision of the Third Circuit in *Philadelphia Newspapers,*[6] the court limited to $25 million Hybrid's right to credit bid. In a footnote, the Third Circuit majority had suggested

> [a] court may deny a lender the right to credit bid in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to foster a competitive bidding advantage.

Based upon this footnote, the bankruptcy court ruled that the limiting "for cause" language of Section 363(k) permitted the circumscription of Hybrid's contractual rights in its collateral. The court said: "the 'for cause' basis upon which the Court is limiting Hybrid's credit bid is that bidding will not only be chilled without the cap; bidding will be frozen."[7]

Even assuming the *Philadelphia Newspapers dictum* is persuasive, the *Fisker* record provided no basis for the limitation of Hybrid's credit bid to $25 million, the price Hybrid paid to succeed to the rights and interests of the DOE. Rather, the "valuation" appears to have been tailored to what the parties and the court perceived to be the maximum amount Wanxiang would tolerate

as a condition to *its* participation in an auction for the Debtors' assets. Thus, at best, the cap was arbitrary. At worst, it was dictated by the demands of a prospective competing bidder.[8]

The Policy Considerations

The fundamental priority rights of a secured creditor, generally and in relation to the sale of its collateral, are deeply embedded in the fabric of reorganization policy. The Bankruptcy Code is rife with provisions designed to afford a secured creditor the benefit of its special bargain — to extend credit based upon the comfort of a lien on the assets of its borrower. That special bargain is one made pursuant to, and enforceable as a matter of, applicable state law, the well-spring of all the property rights the parties bring to a bankruptcy estate.[9] It is the totality of those property rights that comprises the bankruptcy "estate" in all of its fullness. The mere commencement of a bankruptcy affords no basis to enhance or derogate those rights, all of which are constituted as of the petition date. Although special provisions of the Bankruptcy Code — the avoidance of preferences and fraudulent transfers, and equitable subordination to name a few — may affect those rights, they are employed only to promote or protect some essential attribute of the reorganization scheme.

The Supreme Court has recognized the significance of the right of a secured creditor to bid its collateral in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*.[10] There, the issue was whether a debtor's plan providing for a sale of a secured creditor's collateral may deprive a secured creditor of its right to credit bid under Section 1129(b)(2)(A)(ii) by circumnavigating its provisions through the "indubitable equivalent" route of sub-paragraph (iii). On facts similar to those before the court in *Philadelphia Newspapers*, Justice Scalia articulated the policy behind the right to credit bid:

> The ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan.[11]

RadLAX reached the Supreme Court, after the Third Circuit had decided *Philadelphia Newspapers*, on an appeal from the Seventh Circuit's holding that the cram down of a plan providing for the sale of a secured creditor's collateral must chart a course through Section 1129(b)(A)(2)(ii).[12]

Although *RadLAX* was decided upon statutory construction grounds rather than upon broad policy grounds, Justice Scalia nonetheless recognized "the generalized statutory purpose of protecting secured creditors."[13] Justice Scalia's recognition of that purpose is neither new nor novel and has been engrained in the Bankruptcy Code since its overhaul in 1978. Judge Ambro's reasoned analysis in his dissent in *Philadelphia Newspapers* makes this clear. He observed it is free from doubt that, in enacting the new Bankruptcy Code, Congress sought to strengthen the rights of secured creditors, making them more closely resemble their rights under non-bankruptcy law. Quoting Justice Brandeis in *Louisville Joint Stock Land Bank v. Redford*, Judge Ambro articulated those secured creditor rights to include the "right to protect its interest in property by bidding at such [foreclosure] sale…to assure having the mortgaged property devoted primarily to the satisfaction of its debt...."[14]

He harkened back to the overarching principle requiring harmonization of bankruptcy rights with state law-created rights whenever possible. Referring to the state law right to bid a secured debt at foreclosure,

Judge Ambro said "Congress…intended to preserve the presumptive right of a secured creditor under applicable state law to take the property to satisfy its debt."[15] He then recognized the need to interpret the Bankruptcy Code using this principle of harmonization. Quoting *Butner*, he said:

> "[u]nless some federal interest requires a different result," bankruptcy law requires "[u]niform treatment of property interests by both state and federal courts." In circumstances where this was not possible, Congress provided some other protections in the Bankruptcy Code for the secured creditor.[16]

Those protections in relation to an attempt by a debtor to sell collateral free and clear of the liens of the secured creditor clearly are meant to include the right to bid its debt at the sale.

Judge Ambro made it abundantly clear that protection of a secured creditor's state law contract rights is part of an integrated, overarching, and balanced statutory scheme that expresses the overall policy of Congress with respect to secured creditors whose collateral is to be sold free of liens.

> They are part of a comprehensive arrangement enacted by Congress to avoid the pitfalls of undervaluation, regardless of the mechanism chosen, and thereby ensure that the rights of secured creditors are protected while maximizing the value of the collateral to the estate and minimizing deficiency claims against other unencumbered assets.[17]

It plainly strikes at the heart of this "overall policy of Congress" to suggest that the "for cause" language of Section 363(k) could abnegate this fundamental protection for the expedience of fostering a competitive bidding environment — especially one that might be neutral to the *estate* owing to the secured creditor's under-collateralization. To interpret Section 363(k)'s "for cause" language in this context to promote the perception of competitive bidding, ostensibly to serve the interests of the unsecured creditors, actually antagonizes the interests of the estate as a whole. As Judge Ambro observed, the maximization through a credit bid of the value of the collateral for the *estate* minimizes the deficiency claims that otherwise would dilute unsecured creditor recoveries from unencumbered assets.

This "overall policy" is evident in the Bankruptcy Code's recognition of a secured creditor's contractual entitlements. Indeed, the code credits entitlements of a host of creditors to the detriment of unsecured creditors. For example, administrative claims are made senior in distributive right to those of unsecured creditors by Section 503(b) of the Bankruptcy Code. Similarly, the priorities afforded by Section 507(a) to certain classes of unsecured creditors subordinate the interests of general unsecured claimants in the distributive scheme. Finally, Section 1111(b) in non-sale circumstances permits a secured creditor to rest upon the value of its collateral rather than to receive a bifurcated claim by reason of under-security. There exists a policy behind each of these class distinctions — fostering the extension of goods or services to a debtor-in-possession, recognition of special interests of certain classes of unsecured creditors such as taxing authorities, and to permit a secured lender to obtain the benefit of its collateral bargain in a non-sale context. The Bankruptcy Code embraces the entirety of the disparate estate constituencies as a matter of careful balancing among interests, the confluence of which is necessary to the rehabilitative process.

"Although some may argue that credit bidding chills cash bidding, that argument underwhelms; credit bidding chills cash bidding no more than a deep-pocketed cash bidder would chill less-well capitalized cash bidders. Having the ability to pay a certain price does not necessarily mean there is a willingness to pay that price."

***In re Philadelphia Newspapers*, 599 F.3d 298, 321 (3d Cir. 2010)(Ambro, J., dissenting)**

The *Philadelphia Newspapers* majority missed this point. Its *dictum* simply cannot be reconciled with the perspective of *RadLAX* or these basic policy considerations. To the extent the Third Circuit meant that competitive bidding typically enhances an *estate*, and, accordingly, distributions to creditors as a whole, an aim of bankruptcy policy surely is implicated. This is a truism with which no one can argue. However, the estate comprises secured as well as unsecured creditors. If the foundational policy considerations protecting the rights of secured creditors in their collateral can so easily be displaced to enhance distributions to unsecured creditors, something is amiss.

In a parallel context, the Seventh Circuit articulated the difference between the interests of the estate and the interests of a class within the estate. In *Mellon Bank, N.A. v. Dick Corporation*,[18] a preference defendant claimed a secured creditor that had been granted a replacement lien on Article 5 avoidance actions could not prosecute the action and recover under Section 550(a) because the proceeds would not redound to benefit any unsecured creditor. The Seventh Circuit dismissed this contention out of hand and admonished that Section 550(a) speaks clearly in much broader terms. The court said:

> Lest this way of resolving the issue be taken to assume that §550(a) requires that some benefit flow to unsecured creditors, we add that the statute does not say this. Section 550(a) speaks of benefit to *the estate* — which in bankruptcy parlance denotes the set of all potentially interested parties — rather than to any particular class of creditors. What happens to recoveries that reach the estate's coffers depends on contractual and statutory entitlements.[19]

This has long been the rule in the District of Delaware as well.[20]

It similarly should be readily apparent that the limitation of the right of a secured creditor to credit bid at an auction *always* will foster an auction environment in which other bidders will be advantaged. However, that does not necessarily mean the interests of the *estate* will be so advantaged. In *Fisker*, Wanxiang was induced to bid "competitively" only because its "competition" was handicapped by the court's interpretation of the "for cause" language. The perceived benefit of imposing that handicap on Hybrid was that the competition would yield a better payout to unsecured creditors. However, this clearly is invalid as a general principle.[21] As noted in the *Philadelphia Newspapers* dissent:

> Although some may argue that credit bidding chills cash bidding, that argument underwhelms; credit bidding chills cash bidding no more than a deep-pocketed cash bidder would chill less-well-capitalized cash bidders. Having the ability to pay a certain price does not necessarily mean there is a willingness to pay that price.[22]

What policy is advanced by derogating the rights of secured creditors in order to enhance the rights of competing bidders, possibly complete strangers to the estate?[23] This is especially the case where the estate holds no equity in the collateral. Again, as observed by Judge Ambro, this so-called policy "does not even benefit the unsecured creditors, as their recovery is independent of the sale price. The only party that stands to benefit from any undervaluation [of the secured creditor's collateral] is the purchaser of the assets,...."[24]

This focus on the interests of a class of junior creditors, especially those ostensibly "out of the money," rather than the interests of the estate as a whole, is anathema to the construct of reorganization. Typically, the reorganization of estates succeeds

through the process of achieving a consensus among competing interests. In the end, the difficult process of reorganizing a complex business (whether by a rehabilitative plan or a liquidating plan) is "fostered" by crediting, not derogating, the statutory and contractual expectations of the various parties-in-interest. When a finger is placed on the scale to advantage one interest over another, especially by means of abjuring otherwise enforceable rights, the process is perverted and at its least efficient.

Deference to the engrained policy protecting secured creditor rights should dictate that "cause" be found sparingly and only in relatively egregious circumstances. To be clear, just because the rights of a secured creditor to protect its interest in collateral are fundamental on policy grounds doesn't mean they are sacrosanct. Section 363(k) by its terms permits a court to impose upon those rights. But it does not tell us what facts and circumstances justify that imposition. Two obvious situations come to mind: (a) when the liens are not perfected or are avoidable; and (b) when the secured creditor is guilty of conduct sufficiently inequitable to justify subordination of its secured claim. To abrogate or limit a credit bid by merely waiving these assertions in front of a court, however, should be an insufficient basis to overcome the presumed validity of the secured creditor's claim. This especially should be the case where, as in *Fisker*, the parties have represented to the court, "based on all the work that has been done by all parties," that the liens of the creditor are valid in material part with the balance being subject to a dispute "not likely subject to quick or easy resolution."[25] Given the parties' suggestion that sufficient work had been performed to support their conclusions, absent some showing of at least a *prima facie* nature, and the opportunity for the secured creditor to contest that showing, the right to credit bid should not have been circumscribed on this basis alone.[26]

Conclusion

Fisker can be viewed as a non-precedential, result-oriented decision influenced by the court's displeasure with the pace of the proceedings brought on by the Debtors. Whether the unsecured creditors ultimately benefit from the limitation of Hybrid's credit bid remains to be seen. In the meantime, perhaps other bankruptcy and appellate courts will have the opportunity to speak on the issue and reconsider whether the "for cause" language of Section 363(k) ought be employed so easily.

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Originally published by Matthew Bender & Company, Inc. in the February/March 2014 issue of *Pratt's Journal of Bankruptcy Law*.

Notes

[1] *In re Fisker Auto. Holdings, Inc., et al*., 2014 Bankr. LEXIS 230 (Bankr. D. Del. Jan. 17, 2014) (the "Decision"). Hybrid sought an emergency appeal from the Decision as well as certification for direct appeal to the U.S. Court of Appeals for the Third Circuit on an expedited basis. On February 7, 2014, the U.S. District Court for the District of Delaware denied the appeal on the basis that the Decision was not a final order and Hybrid had not met the standard for an interlocutory appeal. *See Hybrid Tech Holdings, LLC v. The Official Comm. Of Unsecured Creditors of Fisker Auto. Holdings, Inc. and Fisker Auto., Inc. (In re Fisker Auto. Holdings, Inc., et al.)*, No. 14-CV-99(GMS), Docket No. 34 (D. Del. Feb. 7, 2014).

On February 12, 2014, the district court entered a Memorandum and Order denying Hybrid's emergency request for certification of direct appeal to the U.S. Court of Appeals for the Third Circuit. *See Hybrid Tech Holdings, LLC v. The Official Comm. of Unsecured Creditors of Fisker Auto. Holdings, Inc. and Fisker Auto., Inc. (In re Fisker Auto. Holdings, Inc., et al.)*, No. 14-CV-99(GMS), Docket No. 35 (D. Del. Feb. 12, 2014) (the "Certification Decision"). In February 2014, a sale hearing was held at which Wanxiang was declared the successful bidder at a price valued at less than the face amount of the asserted secured claims.

[2] Section 363(k) provides:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k).

[3] *Fisker*, 2014 Bankr. LEXIS 230 at *15. *But see id.* at *5 (Uncontested Fact number 6: "The *Debtors* decided that the cost and delay arising from a competitive auction would be reasonably unlikely to increase the value for the estates. The Sale Motion therefore reflects the Debtors' decision to sell the assets to Hybrid through a private sale.") (emphasis supplied). Although not mentioned in the Uncontested Facts, it appears Hybrid previously had advanced significant funds to Fisker to permit the DOE sufficient time to monetize its loan. *See* Hr'g Tr. 110, January 10, 2014 (statement of Debtors' counsel).

[4] The bankruptcy court called Wanxiang "a highly attractive and capable [auction] participant" with a "vested interest in purchasing Fisker" based on its recent purchase, through a bankruptcy auction, of certain assets of A123 Systems which included the lithium ion battery, an essential component of Fisker electric cars. *Fisker*, 2014 Bankr. LEXIS 230 at *13-14.

[5] *Id.* at *6-7 (emphasis supplied).

[6] *In re Philadelphia Newspapers LLC*, 599 F.3d 298, 316 n.14 (3d Cir. 2010) ("*Philadelphia Newspapers*"). The statement was a *dictum* in that the right to credit bid under Section 363(k) was not directly before the court. Rather, the court of appeals considered the question of whether a plan providing for the sale of a secured creditor's collateral could be crammed down under the provisions of Section 1129(b)(2)(A)(iii), requiring a secured creditor to receive the "indubitable equivalent" of its claims, rather than Section 1129(b)(2)(A) (ii), treating specifically with the sale of property subject to liens and affording the secured creditor the right to credit bid as provided in Section 363(k). The majority, in a decision of suspect continuing precedential value after the Supreme Court's decision in *RadLAX* (*infra*), held that the end run around the specific provisions of sub-paragraph (ii) was permissible. *But see*, Certification Decision at 4 ("Contrary to Hybrid's assertion that the Third Circuit's opinion on Section 363(k) was 'a single judge's dicta,'…the court's reasoning regarding Section 363(k)'s for-cause exception to credit bidding was essential to its holding and was a majority ruling.") The Certification Decision failed to consider the impact of the *RadLax* decision on that "majority ruling" and seems to have conflated the questions of whether Section 1129(b)(2)(A)(ii) exclusively governs plan sales of collateral with the bases for limiting a secured creditor's credit bid through the "for cause" language of Section 363(k) once Section 1129(b)(2)(A)(ii) is applied.

[7] *Fisker*, 2014 Bankr. LEXIS 230 at *14. The court also noted that certain of the liens Hybrid obtained from the DOE were subject to challenge. *Id*. at *15.

[8] The Third Circuit in *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 459-61 (3d Cir. 2006) previously had held that the secured creditor could bid the full face value of its debt, including the deficiency portion, because that bid "by definition…*becomes* the value of " the collateral. (Emphasis in original.) In any event, it is important to note that unless the liens of an under-secured creditor are avoided, disallowed, or subordinated, even the perceived benefit to unsecured creditors yielded by limiting the

credit bid would be illusory.

[9] *Butner v. United States*, 440 U.S. 48 (1979); *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984) ("whatever rights a debtor has in property at the commencement of the case continue in bankruptcy — no more, no less") (citing H.R. Rep. No. 595, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787).

[10] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 132 S. Ct. 2065 (2012).

[11] *Id.* at 2070 n.2 (2012).

[12] *River Rd. Hotel Partners v. Amalgamated Bank (In re River Rd. Partners)*, 651 F.3d 642, 653 (7th Cir. 2011) (The Bankruptcy "Code has an expressed interest in insuring that secured creditors are properly compensated.")(citing *Philadelphia Newspapers*, 599 F.3d at 331 (Ambro, J., dissenting)). In an earlier decision, the Fifth Circuit also had stumbled into the dubious construction of Section 1129(b)(2)(A) adopted by the Third Circuit in *Philadelphia Newspapers. See In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009).

[13] *RadLAX Gateway Hotel*, 132 S.Ct. at 2073.

[14] *Philadelphia Newspapers*, 599 F.3d at 331 (quoting *Louisville Joint Stock Land Bank v. Redford* , 295 U.S. 555, 594-95 (1935)).

[15] *Philadelphia Newspapers*, 599 F.3d at 331.

[16] *Id.* (quoting *Butner v. United State*s, 440 U.S. 48, 55 (1979)).

[17] *Philadelphia Newspapers*, 599 F.3d at 334; *SubMicron*, 432 F.3d at 460.

[18] *Mellon Bank, N.A. v. Dick Corp.,* 351 F.3d 290 (7th Cir. 2003).

[19] *Id.* at 293 (emphasis in original).

[20] *See, e.g., TWA v. Travelers Int'l A.G* (*In re TWA)* 163 B.R. 964, 972 (Bankr. D. Del. 1994) ("Section 550(a) requires a benefit to the 'estate, ' not to creditors. 'Estate' is a broader term than 'creditors.'"). The bankruptcy court for the Southern District of New York has also found that to be the case. *See Tronox v. Anadarko Petroleum Corp*. *(In re Tronox Inc.)*, 464 B.R. 606, 613 (Bankr. S.D.N.Y. 2012) ("The concept of the estate is not limited to the interest of creditors or a subclass of creditors.").

[21] Moreover, putting aside that this putative benefit would arise only after a post-sale litigation in which it would be assumed the Committee would prevail, why was it not clearly the case that unsecured creditors *already* had received a substantial benefit from the original DOE loan that breathed life into the entity with which, until its demise, the unsecured creditors traded profitably? *See Mellon Bank*, 351 F.3d at 293 (finding that Section 550(a) may be satisfied by an indirect benefit to the estate *ex ante*). To suggest that the investment of $170 million is an irrelevance as a matter of benefit to the estate simply is to disregard the economic realities of commerce. The assets over which "competitive" bidding is sought exist only because the secured creditor advanced the funds to acquire them. Money is needed; money is loaned; but each only pursuant to a bargain that serves both parties. Absent some infirmity in the validity or priority of the secured claim, to discredit the value given *ex ante* advances no grand policy considerations.

[22] *Philadelphia Newspapers*, 599 F.3d at 321.

[23] We recognize the distinction argued by Judge Ambro between the value to the estate provided by an original lender credit bidder as opposed to that afforded by a secondary purchaser credit bidder. *Philadelphia Newspapers*, 599 F.3d at 336-37. However, this analysis seems to be at odds with both *SubMicron* and *Mellon Bank*. *SubMicron* validates the principle that secured creditors are permitted to bid the full amount of their claims. *SubMicron*, 432 F.3d at 461. *Mellon Bank* makes clear that the value provided to the estate by the secured creditor need not be contemporaneous but may be *ex ante*. *Mellon Bank,* 351 F.3d at 293. Moreover, the allowance of a claim under Section 506(a) does not depend on whether the holder is a par or discounted holder. Finally, even if one presumes the secondary purchaser is motivated by "acquiring the debtor's assets as cheaply as possible rather than maximizing the recovery on its secured loan," each type of holder is motivated to win the bid and to recover on its remaining deficiency claim, if any. *Philadelphia Newspapers*, 599 F.3d at 336 (quoting Ralph Brubaker, *Cramdown of an Undersecured Creditor Through Sale of the Creditor's Collateral: Herein of Indubitable Equivalence, the §1111(b)(2) Election, Sub Rosa Sales, Credit Bidding, and Disposition of Sale Proceeds*, 29 No. 12 Bankruptcy Law Letter 1, 12 (Dec. 2009)).

[24] *Philadelphia Newspapers,* 599 F.3d at 336.

[25] *Fisker*, 2014 Bankr. LEXIS 230 at *7-8.

[26] Based upon the statements of Debtors' counsel, it appears the suspect liens were both limited and did not necessarily attach to the assets Hybrid proposed to acquire with its credit bid. (*See, e.g.* Hr'g Tr. at 111-113.) At the hearing, counsel to the Committee made much of the alleged infirmity of certain of Hybrid's liens. However, other than the agreement between the Debtors and the Committee that a portion of the security interests were subject to challenge, not even a *prima facie* showing of any such infirmity made its way into the record. Plainly, nobody asked Hybrid whether it agreed certain of its liens were invalid.