Commercial Financial Services Brief: Supreme Court Affirms a Secured Creditor's Right to Credit Bid for its Collateral at a Sale Under a Bankruptcy Plan

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The U.S. Supreme Court has delivered its much anticipated decision in RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. ___ (2012), holding that a secured creditor may not be denied the right to credit bid at a bankruptcy sale of its collateral that is conducted pursuant to a Chapter 11 plan of reorganization. This decision, which resolves conflicting precedent among the federal Circuit Courts of Appeal, confirms that a secured creditor has a right to credit bid at a bankruptcy sale of its collateral regardless of whether the sale occurs prior to, or pursuant to, a Chapter 11 plan of reorganization.

A secured creditor's right to credit bid (i.e., bid its debt rather than cash) at a foreclosure sale of its collateral is a well-recognized state-law right that allows a secured creditor to protect itself against a foreclosure sale of its collateral at a price below the amount of its debt. This important secured creditor protection is incorporated into federal bankruptcy law by Section 363(k) of the Bankruptcy Code, which provides that a secured creditor also may bid its debt at a bankruptcy sale of its collateral. In recent years, however, a split of authority has arisen as to whether this right may be denied to a secured creditor if the bankruptcy sale occurs pursuant to the terms of a plan of reorganization that has been confirmed by the bankruptcy court over the secured creditor's objection. Section 1129(b)(2)(A) of the Bankruptcy Code provides that a bankruptcy court may confirm a plan of reorganization over the objection of a secured creditor if the plan provides:

(ii) for the sale, *subject to section 363(k) of this title*, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale …; or

(iii) for the realization by such holders of the *indubitable equivalent* of such claims.

(Emphasis added.) Section 1129(b)(2)(A)(ii) explicitly requires that, if a secured creditor's collateral is to be sold free and clear of its lien pursuant to a confirmed plan of reorganization, the secured creditor must be allowed to credit bid at the sale. Notwithstanding that express reference to the section 363(k) credit bidding rights, in *In re Philadelphia Newspapers, LLC,* 599 F.3d 298 (3rd Cir. 2010), the Third Circuit Court of Appeals held that a secured creditor's right to credit bid at a sale of its collateral under a confirmed plan of

reorganization was not absolute if the selling debtor otherwise provided the secured creditor with the indubitable equivalent of its secured claim. In *RadLAX,* the Supreme Court overturned that decision, describing its interpretation of Section 1129(b)(2)(A) as "hyperliteral and contrary to common sense." *RadLAX*, 566 U.S. at ___.

The Supreme Court's *RadLAX* decision has made the secured creditor's right to credit bid at a sale of its collateral complete, whether the sale is a state-law foreclosure sale or any type of bankruptcy sale.

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