

Fordham Journal of Corporate & Financial Law

Volume 20, Number 1

2014

Article 7

Chapter 11 Asset Sales: Will There Be A Chilling Effect on Section 363(K) Credit Bidding After In Re Fisker Automotive Holdings LLC?

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**CHAPTER 11 ASSET SALES: WILL THERE BE A
CHILLING EFFECT ON SECTION 363(K) CREDIT
BIDDING AFTER *IN RE FISKER AUTOMOTIVE
HOLDINGS LLC?***

*Riley Orloff**

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INTRODUCTION

Enacted in 1978, the Bankruptcy Code,¹ under 11 U.S.C. § 363(k), permits the practice of credit bidding—the process through which a

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secured creditor may offset the purchase price a creditor pays at auction by the face value of the lien securing the claim²—in sales under § 363(b).³ However, judicial recognition of this right dates back as far as the 1930s.⁴ Even though the United States Supreme Court, in *Wright v. Vinton Branch of the Mountain Trust Bank*, indicated that the right to credit bid was not absolute,⁵ section 363(k)—as originally enacted—did not appear to permit judicial discretion.⁶ Despite absolute language regarding the right to credit bid under § 363(k), legal scholarship suggests that Congress did not intend to alter the right to credit bid, codifying the right only to the extent that it existed prior to 1978.⁷ Whether or not the original § 363(k) altered credit bidding is of no consequence because Congress clarified the matter with the Bankruptcy Amendments and Federal Judgeship Act of 1984.⁸ After amendment, § 363(k) provided the bankruptcy courts with the express power to limit a creditor’s ability to credit bid “for cause.”⁹

Despite providing courts with the discretion to limit credit bidding for cause, the number of instances where a bankruptcy court has exercised its power to abridge credit bidding has been exceedingly rare and almost invariably requires a showing of collusion or a bona fide

1. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. § 101 *et seq.*).

2. Vincent Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 GEO. MASON L. REV. 99, 102-04 (2010) (providing an overview of credit bidding).

3. See 11 U.S.C. § 363(k) (1978) (amended 1984).

4. See, e.g., *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440 (1937) (recognizing a creditor bundle of rights that includes the right to credit bid); *Morgan v. Blieden*, 107 F.2d 133 (8th Cir. 1939) (allowing a bidder to calculate bid in an amount including claim against assets); *Miners Sav. Bank v. Joyce*, 97 F.2d 973 (3d Cir. 1938) (finding the same).

5. *Wright*, 300 U.S. at 457.

6. Pub. L. No. 95-598, § 363(k), 92 Stat. 2549 (1978) (amended 1984).

7. See 3 Collier on Bankruptcy ¶ 363.09 (16th ed.) (“The right of a lienholder whose lien was not in bona fide dispute to bid at a sale free and clear of liens was generally recognized under prior law, and this right is continued by section 363(k).”) (footnote omitted).

8. Pub. L. No. 98-353, § 442(g), 98 Stat. 333 (amending 11 U.S.C. § 363(k)).

9. *Id.*; see also 11 U.S.C. § 363(k) (2012) (“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.”).

dispute.¹⁰ In *In re Philadelphia Newspapers, LLC*, the Third Circuit noted that under the language of § 363(k), 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 environment.”¹¹ This assertion advocates for an expanded view of judicial discretion with regard to for cause limitations to credit bidding; however, no bankruptcy court had used the “chilling effects” of credit bidding as the primary basis for limiting a credit bid until *In re Fisker Automotive Holdings, LLC*.¹²

In *Fisker*, a January 2014 opinion, Judge Kevin Gross of the United States Bankruptcy Court for the District of Delaware limited a secured creditor’s right to credit bid because a failure to do so would have effectively eliminated the possibility of a public auction.¹³ In doing so, Judge Gross cited to *Philadelphia Newspapers* as the authority permitting this limitation.¹⁴ Should this interpretation of judicial discretion under § 363(k) gain favor, the practice of credit bidding in asset sales could be severely impacted.¹⁵

Despite the expansive language of *Fisker*, practitioners have questioned what precedential value the opinion might have.¹⁶ Notably, Judge Gross himself may have intended to limit this holding to the facts of the case.¹⁷ Additionally, the facts leading up to this decision raised concerns about whether the liens had been properly perfected at all, which would ultimately determine whether the secured claim was even allowable.¹⁸ This dispute is significant because the language of § 363(k) only provides the right to credit bid *allowed claims*.¹⁹ In situations where

10. Mark Wege, Ed Ripley & Aaron Power, *Current Issues Involving Section 363(k) Credit Bids*, 6 PRATT J. BANKR. L., no. 1, 2010 at 13, 15-16.

11. 599 F.3d 298, 316 n.14 (2010) (citing 3 Collier on Bankruptcy ¶ 363.09[1] (16th ed.) (“The Court might [deny credit bidding] if permitting the lienholder to bid would chill the bidding process.”)).

12. *In re Fisker Auto. Holdings, L.L.C.*, No. 13–13087(KG), 2014 WL 210593, at *5 (Bankr. D. Del. Jan. 17, 2014).

13. *Id.*

14. *Id.* (citing *In re Philadelphia Newspapers*, 599 F.3d at 316 n.14).

15. See *infra* Section III and accompanying notes.

16. See Oscar N. Pinkas & Joseph G. Selby, *Is Fisker Automotive Holdings a New Limit on Credit-Bidding?*, AM. BANKR. INST. J., April 2014, at 14.

17. See *id.* at 85.

18. *In re Fisker Auto. Holdings, Inc.*, No. 13–13087(KG), 2014 WL 210593, at *2 (Bankr. D. Del. Jan. 17, 2014) (“What collateral is thereby secured remains at issue.”).

19. 11 U.S.C. § 363(k) (2012).

the claim is subject to a bona fide dispute, limiting a creditor's ability to credit bid is consistent with prior case law.²⁰

This paper examines *In re Fisker* in an effort to determine its precedential value and its implications for future credit bidding. Part I studies the history of credit bidding in order to better understand what is encompassed by § 363(k)'s for cause limitation. Part II studies the issues presented in *Fisker*, including a review of the facts leading up to Judge Gross's decision and a discussion of the multiple for cause bases set forth in the opinion. Part III surveys the potential impact of *Fisker* and briefly investigates the potential concerns for practitioners going forward. The Note concludes that application of *Fisker* will likely remain limited to the facts of the case.

I. THE HISTORY OF CREDIT BIDDING IN BANKRUPTCY

In order to properly discuss the direction in which the right to credit bid is heading, it is instructive to examine where that right came from. Subsection (A) of this Part looks to the historic roots of credit bidding in an attempt to examine the loom from which Bankruptcy Code's credit bidding protections were woven. Subsection (B) of this Part discusses the evolution of credit bidding after the enactment of the Bankruptcy Code and look at how courts have interpreted both § 363(k) and § 1129(b)(2)(A).

A. CREDIT BIDDING PRIOR TO THE BANKRUPTCY CODE

With the Bankruptcy Act of 1898, Congress did not explicitly recognize the right to credit bid.²¹ However, Section 57(h) the Act—which provided for the valuation of security interests—stated that the value of the collateral “shall be determined by converting the same into money according to the terms of the agreement” between the creditor

20. See, e.g., *In re Octagon Roofing*, 123 B.R. 583 (Bankr. N.D. Ill. 1991); Wege, et al. *supra* note 10, at 15-16; RICHARD N. TILTON, PURCHASE AND SALE OF ASSETS IN BANKRUPTCY CASES §11.9 (1984) (“Thus, if the collateral is offered at a price exceeding the original valuation, the creditor may bid in the full amount of the unsecured claim *as long as it was properly secured.*”) (emphasis added).

21. 30 Stat. 554, 560, 55th Cong. (2nd Sess. 1898).

and the debtor.²² This section allowed parties to contract for specific rights-related bidding procedures and the terms of foreclosure.²³

Soon after Congress recognized the right of parties to contract for specific rights, the courts recognized, *inter alia*, the right to credit bid absent a contractual obligation.²⁴ In *Louisville Joint Stock Land Bank v. Radford*,²⁵ the Supreme Court addressed the rights of secured creditors in connection with the farm foreclosure provisions of the Frazier-Lemke Act of 1934.²⁶ Striking down the Frazier-Lemke Act, the Supreme Court held that mortgagees were deprived of the rights traditionally recognized under United States law.²⁷ Absent procedures ensuring fair compensation and due process of law, the Court held that this deprivation constituted an impermissible taking under the Due Process Clause of the Fifth Amendment.²⁸ Under the Act, secured creditors were deprived of their rights to:

- (1) retain the lien until the indebtedness thereby secured is paid . . .
- (2) realize upon the security by a judicial public sale . . . (3) determine when such sale shall be held, subject only to the discretion of the court . . .
- (4) protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself . . .
- (5) control meanwhile the property during the period of default, subject

22. *Id.* Additionally, Section 68(a) of the Act permitted set-offs regarding mutual debts. *See id.* at § 68(a). Credit bidding could be thought of an extension of set-off doctrine in that, after the auction, creditor and debtor hold mutual debts—which would allow for the application of Section 68(a)—with only the balance remaining to be paid.

23. Bankruptcy Act of 1898, § 57(h), 30 Stat. 554, 560, 55th Cong. (2nd Sess. 1898) (“by agreement”).

24. *See generally*, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (acknowledging the right to credit bid in foreclosure sales).

25. *Id.*

26. Frazier-Lemke Farm-Mortgage Act (Agricultural Debt Relief Act), ch. 869, 48 Stat. 1289 (1934) (codified at 11 U.S.C. § 203(s) (1934)); *see also* Charles J. Tabb, *Credit Bidding, Security, and the Obsolescence of Chapter 11*, 2013 U. ILL. L. REV. 103, 114 n.67 (2013) (“[The] Act provided appraisal rights to farm debtors, for the debtor’s purchase of an encumbered farm at appraised value with mortgagee’s consent, or for debtor’s retention of possession for five years with the option to purchase at any time at appraised or reappraised value, subject to payment of reasonable rental fixed by court.”).

27. *Radford*, 295 U.S. at 869.

28. *Id.*; *see also* Tabb, *supra* note 26, at 114 n.69 (recognizing the dual holding of *Radford* in that both the Takings and Due Process clauses of the Fifth Amendment would render the Frazier-Lemke Act unconstitutional).

only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.²⁹

Thus, in *Radford*, the Supreme Court officially recognized, *inter alia*, the right to credit bid in the context of the sale of distressed property.³⁰ Following the decision in *Radford*, Congress enacted a revised version of the Frazier-Lemke Act³¹ that withstood judicial scrutiny in *Wright v. Vinton Branch of the Mountain Trust Bank*.³² One distinguishing aspect of the Revised Act—and ultimately the determinative factor in upholding the statute—was that the Act’s provisions did not deprive a creditor of any one right.³³ As enumerated in *Radford*, the Act did not impair rights (1), (2), and (4), and only limited a creditor’s ability to exercise rights (3) and (5).³⁴ In *Wright*, the Supreme Court held that this impairment did not violate the Fifth Amendment.³⁵

Congress further amended the Bankruptcy Act in 1938, several years after the *Radford* and *Wright* decisions; however, Congress chose not to codify a creditor’s right to credit bid in these amendments.³⁶ Instead, Congress relied on the parties’ contractual relationships and applicable non-bankruptcy law to dictate the process and procedures of auction sales.³⁷

29. *Radford*, 295 U.S. at 594–95 (numerals added).

30. *Id.*

31. Act of Aug. 28, 1935, ch. 792, 49 Stat. 942 (amending 11 U.S.C.A. § 203(s) (1935)).

32. 300 U.S. 440 (1937).

33. *Id.* at 457. The *Wright* court was also quick to note that the *Radford* decision should be construed as a ‘totality’ test, rather than a bright-line rule that deprivation of any one right would render a statute invalid *per se*. *Id.* at 457 (“It was not held that the deprivation of any one of these rights would have rendered the Act invalid, but that the effect of the statute in its entirety was to deprive the mortgagee of his property without due process of law.”).

34. *Id.* at 457.

35. *Id.* The Supreme Court’s decision to uphold a statute that curtails a creditor’s rights at common law likely provided support to the “for cause” limitation ultimately imposed on a creditor’s right to credit bid under § 363(k). *See generally*, Pub. L. No. 98-353, § 442(g) (1984) (adding “for cause” limitation to § 363(k)).

36. The Chandler Act, § 116(3), 52 Stat. 883. Section 116(3) of the Chandler Act permits pre-plan sales in a manner similar to § 363 of the Bankruptcy Code; however, this section does not include a provision for credit bidding. *Id.*

37. *Id.* § 57(h); *see also id.* § 216(7) (cram down procedures).

B. CREDIT BIDDING UNDER THE BANKRUPTCY CODE

In 1978, Congress passed a full-scale reform of federal bankruptcy law.³⁸ As part of the comprehensive reform, Congress enacted § 363(k),³⁹ which recognized a secured creditor's right to credit bid in sales outside of a plan of reorganization, and § 1129(b)(2)(A)(ii),⁴⁰ which provided for credit bidding as a means to cram down a dissenting creditor and confirm a Chapter 11 plan.⁴¹

Subsection (i) of this Part illustrates how credit bidding under § 363(k) of the Code works and examines several cases to determine the extent to which courts may impair the right to credit bid. Subsection (ii) of this Part illustrates the process by which debtors may cram down a Chapter 11 plan using § 1129(b)(2)(A) of the code and discusses the recent controversy concerning the “indubitable equivalent” prong of that section.

1. The Right to Credit Bid Under § 363(k)

Section 363(k) was enacted as a mechanism to (1) guarantee that a secured creditor's rights that existed prior to bankruptcy continue throughout the process and (2) ensure the proper valuation of property disposed of outside the traditional processes of Chapter 7 or Chapter 11.⁴² In essence, § 363(k) was enacted to codify the existing right to

38. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. § 101 *et. seq.*).

39. 11 U.S.C. § 363(k) (1978) (“At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.”); Buccola & Keller, *supra* note 2, at 99 (“Today, some 56 percent of debtors with any value to speak of essentially sell all of their assets.”).

40. See 11 U.S.C. § 1129(b)(2)(A)(ii) (1978) (“subject to section 363(k)”).

41. Compare 11 U.S.C. § 363 (permitting debtor to sell property outside a plan of reorganization), with 11 U.S.C. § 1129 (permitting debtor to sell property within a plan of reorganization).

42. See TILTON, *supra* note 20, § 11.9 (“No prior valuation under § 506(a) would limit the bidding right, since the actual bid at sale is determinative of value.”) (citing S. Rep. No. 95-989, 95th Cong., 2d Sess. 56 (1978); 124 *Cong. Rec.* H 11,093 (Sept. 28, 1978); S. 17409 (Oct. 6 1978)); see also Buccola & Keller, *supra* note 2, at 103-04 (arguing that the results of credit bid auctions should mimic the value-maximizing results of all-cash transactions); Michael J. Hoffman, Note, *RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank: Examining the Importance of Credit Bidding at Chapter 11 Asset Sales*, 50 HOUS. L. REV. 1223, 1248-49 (2013) (“First, credit bidding preserves a lender's property interest that was acquired long before the debtors even entered

credit bid recognized in *Radford* and *Wright*.⁴³ Despite Congress's intent to grant creditor the right to credit bid to the extent the practice was allowed at common law, the plain language of § 363(k)—as originally enacted—did not clearly permit courts to limit a creditor's right to credit bid.⁴⁴ To remedy this, Congress amended the section in 1984, adding a “for cause” limitation to the right to credit bid.⁴⁵

Traditionally, courts have been hesitant to limit a creditor's right to credit bid under § 363(k).⁴⁶ When considering whether to restrict credit bidding, courts have discussed several factors, including: (i) notice to other parties in interest, especially other secured creditors; (ii) the ability of the credit bidder to provide a deposit or other form of protection to the estate in case the credit bidder's lien is subsequently challenged successfully; (iii) the adequacy of the purchase price; and (iv) the benefit to the debtor's estate.⁴⁷ While the use of syndicated loans and other joint investment vehicles has raised new credit bidding issues in recent years,⁴⁸ the two traditional areas where courts limit a creditor's

bankruptcy. Second, credit bidding brings increased cash value to the bankruptcy estate. Finally, credit bidding instills corporate lenders with confidence that they will retain their rights during bankruptcy, which opens credit markets and reduces interest rates.”).

43. See 3 Collier on Bankruptcy ¶ 363.09 (16th ed.) (“The right of a lienholder whose lien was not in bona fide dispute to bid at a sale free and clear of liens was generally recognized under prior law, and this right is continued by section 363(k).”) (footnote omitted). Outside of bankruptcy, at least 42 states have enacted statutes that permit credit bidding. See Jason S. Brookner, *Pacific Lumber and Philadelphia Newspapers: The Eradication of a Carefully Constructed Statutory Regime Through Misinterpretation of Section 1129(b)(2)(A) of the Bankruptcy Code*, 85 AM. BANKR. L.J. 127, 139 n.68 (2011) (citations omitted) (providing citations to cases and statutes that authorize credit bidding).

44. See 11 U.S.C. § 363(k) (1978).

45. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 442(g), 98 Stat. 333 (amending 11 U.S.C. § 363(k)) (“Section 363(k) of title 11 of the United States Code is amended by striking out ‘if the holder’ and inserting in lieu thereof ‘unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder.’”).

46. See *Wege*, et al., *supra* note 10, at 15 (“[T]he court has the ability to prohibit a creditor from credit bidding its claims ‘for cause.’ This is a rare occurrence.”).

47. John T. Gregg, *A Review of Credit Bidding Under 11 U.S.C.A. § 363(k)*, 2008 NORTON ANN. SURV. BANKR. L. 17 (2008).

48. See *Wege*, et al., *supra* note 10, at 16 (discussing when the liens of other secured creditors are in *pari passu* with the liens of the secured creditor attempting to credit bid). For other recent examples of litigation regarding “for cause” issues, see *Wege*, et al., *supra* note 10, at 16-32 and accompanying notes.

ability to credit bid involve either a bona fide dispute to the claim itself or collusion in the sale process.⁴⁹

In *In re Octagon Roofing*, the court modified a creditor's right to credit bid its claim after the trustee established a bona fide dispute as to the validity of the creditor's lien.⁵⁰ Whereas in *In re Theroux*, the court denied the creditor the right to credit bid when the facts indicated the creditor would receive a sweetheart deal to the detriment of all other creditors.⁵¹ Lastly, in *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Systems Corp.)*, the Third Circuit held that a creditor holding a completely deficient secured claim had the right to credit bid the full amount of its secured claim.⁵²

a. *In re Octagon Roofing*

In *In re Octagon Roofing*, the debtor proposed to sell a manufacturing facility used to produce roofing material, along with all the equipment and inventory on the premises in an action pursuant to

49. See, e.g., *In re Moritz*, 162 B.R. 618, 619 (Bankr. M.D. Fla. 1994); *In re Octagon Roofing*, 123 B.R. 583, 588 (Bankr. N.D. Ill. 1991) (requiring the credit-bidding bank to deliver an irrevocable letter of credit to the trustee to secure the portion of the bid based on a mortgage that was the subject of a pending adversary proceeding); *In re Miami Gen. Hosp., Inc.*, 81 B.R. 682, 688 (S.D. Fla. 1988) (permitting the purchasing bank an offset on an immediate basis but then ordering that the offset will be negated should the bank lose at trial on the objection to claim and that the bank will be liable for interest from the date of the sale); *Bank of Nova Scotia v. St. Croix Hotel Corp. (In re St. Croix Hotel Corp.)*, 44 B.R. 277-79 (D. V.I. 1984) (finding the same); *In re Theroux*, 169 B.R. 498, 499 (Bankr. D.R.I. 1994) (denying trustee's proposed sale of liquor license for price substantially below market value, which would only benefit secured party and has specific purpose of wiping out interests of taxing authorities); *In re Diebart Bancroft*, No. 92-3744, 1993 WL 21423, at *4 (E.D. La. Jan. 26, 1993) (upholding sale where no evidence of collusion sufficient to establish lack of good faith and selling price was fair); see also Boris I. Mankovetskiy, *The Nuts And Bolts Of Credit Bidding: A Primer For Traditional Lenders And Distressed Debt Investors*, METRO. CORP. COUNS., March 2011, at 18 ("If there is a bona fide dispute as to the validity, extent or priority of the secured creditor's lien or the amount of its allowed claim, the Bankruptcy Court may condition the creditor's ability to credit bid on the creditor's agreement to pay the purchase price in cash if the claim is ultimately disallowed."); Brad B. Erens & David A. Hall, *Secured Lender Rights in 363 Sales and Related Issues of Lender Consent*, 18 AM. BANKR. INST. L. REV. 535, 558 (2010).

50. 123 B.R. 583 (Bankr. N.D. Ill. 1991).

51. 169 B.R. 498 (Bankr. D.R.I. 1994).

52. 432 F.3d 448 (3d Cir. 2006).

§ 363(b).⁵³ Approximately two weeks after the sale motion, a creditor holding an uncontested lien on the debtor's equipment and inventory and a disputed second mortgage on the manufacturing facility filed an objection to the sale.⁵⁴ In lieu of determining the validity of the second mortgage—which the trustee was challenging as a fraudulent conveyance⁵⁵—the court required the creditor to submit an irrevocable letter of credit in the amount of the disputed mortgage, in exchange for which the creditor was allowed to credit bid the full amount of its disputed and undisputed claims.⁵⁶ The court based its ruling on the fact that the trustee presented credible evidence that placed the creditor's mortgage in dispute and that, absent adequate protection, allowing the creditor to credit bid a disputed claim could have injured other parties should the creditor eventually fail to prove its claim.⁵⁷ While the court did not bar the creditor from credit bidding its disputed claim, the court did require protection proportional to the risk borne by other parties—i.e. the court impaired the creditor's ability to credit bid the full value of its claim.⁵⁸

b. *In re Theroux*

In *In re Theroux*, the debtor and its largest secured creditor co-sponsored a sale proposal to convey title to its liquor license—valued at \$20,000 to \$30,000—to that creditor for a credit bid in the amount of \$3,000.⁵⁹ Both state and local taxing authorities objected to the sale on the basis of collusion.⁶⁰ In denying the proposed sale, the *Theroux* court examined both the adequacy of the purchase price and the statements of the parties and ultimately held that the debtor and secured creditor failed to show evidence of a legitimate sale.⁶¹

53. *In re Octagon Roofing*, 123 B.R. at 584-85.

54. *Id.*

55. *Id.* at 585. The second mortgage was provided as part of the debtor's guarantee of a third party debt. *Id.* at 585-86. The Trustee argued that this conveyance was fraudulent because the debtor received less than fair value in return. *Id.*

56. *Id.* at 588.

57. *Id.* at 592.

58. *Id.*

59. *In re Theroux*, 169 B.R. at 498. The subsequent plan was for the secured creditor to sell the license at market value and keep the proceeds. *Id.*

60. *Id.*

61. *Id.* at 499.

First, the court relied on statements made by the secured creditor who represented that the debtor's primary purpose for the sale was to destroy the interests held by the various taxing authorities in the proceeds from a sale of the liquor license.⁶² Second, the court held that this bad faith motive created a presumption of a conflict of interest that the parties failed to rebut.⁶³ Third, the court determined that the "blatantly inadequate" sale price was further evidence of collusive intent.⁶⁴ Despite the court's disapproval of the actions taken by the creditor and trustee, the creditor argued that its right to credit bid up to the full amount of its \$400,000 claim rendered the proposed sale price irrelevant.⁶⁵ Agreeing with the secured creditor, the court held that this situation was precisely the set of facts that allowed the court to proscribe credit bidding for cause under § 363(k).⁶⁶

c. *In re SubMicron Systems Corp.*

In 1997, SubMicron was experiencing cash flow issues and sought financing to continue its operations.⁶⁷ From 1997 to 1999, SubMicron secured financing through a revolving credit facility and several issuances of high-yield notes—all secured to varying degrees by liens encumbering substantially all of SubMicron's assets.⁶⁸ The additional financing proved unsuccessful as SubMicron continued to sustain substantial net losses.⁶⁹ In July 1999, SubMicron entered negotiations with its secured lenders regarding a potential acquisition of the company's assets, and on August 31, 1999, SubMicron entered into an asset purchase agreement with a joint venture entity created by the company's secured creditors.⁷⁰ On September 1, 1999, SubMicron filed for Chapter 11 relief and moved to sell its assets pursuant to § 363(b).⁷¹ Of the \$55.5 million proposed purchase price, \$10.2 million consisted of cash earmarked to satisfy various priority claims and \$40 million

62. *Id.* at 499 & n.2.

63. *Id.* at 499.

64. *See id.*

65. *Id.* at 499 n.3.

66. *Id.*

67. *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 452 (3d Cir. 2006).

68. *Id.*

69. *Id.*

70. *Id.* at 453.

71. *Id.*

consisted of a credit bid on behalf of claims held by the secured creditors who formed the acquiring entity.⁷² The district court approved the sale—over the objections of the unsecured creditors’ committee—and the auction closed on October 15, 1999.⁷³

The creditors’ committee filed an adversary proceeding following the sale arguing, *inter alia*, that the acquiring entity should not have been permitted to credit bid the full value of the secured creditors’ claims.⁷⁴ The district court ruled in favor of the debtor—re-affirming the sale—after which, the plan administrator appealed the decision to the Third Circuit.⁷⁵ The main argument against allowing the creditor’s to credit bid centered on the district court’s factual finding that—given the extent of prior liens—there was no collateral available to secure the 1999 fundings at the time they were made.⁷⁶ The plan administrator argued that since the security had no actual value at the time of issuance, that funding should be treated as unsecured for the purposes of credit bidding.⁷⁷ Nevertheless, the Third Circuit held that the plain language of § 363(k) extended the right to credit bid up to the amount of an “allowed claim,” which includes both the secured and deficiency portions of a claim under § 506(a).⁷⁸ Thus, even though the claim based on the 1999 series of notes could have been entirely a deficiency claim, the plain

72. *Id.* The balance of the bid consisted of assumed liabilities. *Id.*

73. *Id.* The district court approved the sale following a withdrawal of reference. *See id.*; *see generally*, 28 U.S.C. § 157 (2012) (outlining the procedure for withdrawal of reference).

74. *In re SubMicron* 432 F.3d at 453. The plan administrator was subsequently substituted for the creditors’ committee in the proceeding. *Id.*

75. *Id.*

76. *Id.* at 459.

77. *Id.*

78. *Id.* at 461. Interestingly, the Third Circuit relies on language of a dissenting Supreme Court Justice as authority for defining “allowed claim” in that manner. *See id.* (citing *Dewsnup v. Timm*, 502 U.S. 410, 422 (1992) (Scalia, J., dissenting)). Despite a lack of authority for the Third Circuit’s definition of allowed claim, allowing a secured creditor to credit bid up to the full value of the claim makes intuitive sense because the § 363 auction provides a market-test for the value of the claim where a secured creditor would not benefit from credit bidding higher than the true value of the collateral. *See id.* at 460 (“Naturally, Lender will not outbid Bidder unless Lender believes it could generate a greater return [owning the asset] than the return for Lender represented by Bidder’s offer.”).

language of § 363(k) still permitted the secured creditor to credit bid its full value.⁷⁹

2. *The Right to Credit Bid Under § 1129(b)(2)(A)*

Section 1129(b)(2)(A) permits a plan to be confirmed over the objection of an impaired secured creditor if the plan: (i) provides the creditor with payments totaling the value of the allowed claim and allows the creditor to retain its lien securing claim, (ii) provides for the sale of the collateral with the creditor able to credit bid its claim, or (iii) provides the creditor with the indubitable equivalent of its claim.⁸⁰

Several recent decisions have addressed whether a creditor has any right to credit bid under § 1129(b)(2)(A).⁸¹ In *In re Philadelphia Newspapers, Inc.*⁸² and *In re Pacific Lumber, Inc.*,⁸³ the Third and Fifth Circuits discussed whether a debtor could circumvent the requirement of credit bidding under § 363(k) in sales under a plan of reorganization.⁸⁴ Addressing the issues raised by *Pacific Lumber* and *Philadelphia Newspapers*, the Supreme Court, in *RadLAX Gateway Hotel v. Amalgamated Bank*, held that the ability to credit bid was clearly and unambiguously intended to apply to asset sales within the cram down context.⁸⁵

a. *In re Pacific Lumber, Co. and In re Philadelphia Newspapers, LLC*

In *In re Pacific Lumber, Co.*, the debtor sought to sell 200,000 acres of redwood timberland encumbered by a lien securing \$740 million in notes.⁸⁶ Under the proposed plan, the proceeds of the sale, nearly \$513.6 million in cash, would be distributed to the note holders in

79. *Id.* Intuitively, this also makes sense because allowing the credit bid eliminates any payout a creditor might be entitled to should it chose not to credit bid and accept a distribution on its claim. *See* Buccola & Keller, *supra* note 2, at 102-103. The decrease in total claim value benefits both the estate and unsecured creditors. *Id.*

80. 11 U.S.C. § 1129(b)(2)(A) (2012).

81. *Cf.* Buccola & Keller, *supra* note 2, at 100 (“Until very recently, the value inherent in credit bidding was not in jeopardy, as bankruptcy courts had virtually no authority to enjoin the practice.”).

82. 599 F.3d 298 (3d Cir. 2010).

83. 584 F.3d 229 (5th Cir. 2009).

84. Buccola & Keller, *supra* note 2, at 101.

85. 132 S. Ct. 2065 (2012).

86. 584 F.3d 229, 236 (5th Cir. 2009).

satisfaction of its allowed claim.⁸⁷ Despite a judicial determination following “extensive valuation testimony” that the timberland was worth “not more than \$510 million,” the secured creditor voted to reject the plan.⁸⁸

In *In re Philadelphia Newspapers, LLC*, the debtor proposed to sell substantially all of its assets for only \$66.5 million—\$37 million in cash and real property valued at \$29.5 million—free and clear of a secured creditor’s claim valued at nearly \$318 million.⁸⁹ The secured creditor objected to the auction procedures proposed by the debtor, an issue which was ultimately appealed to the Third Circuit.⁹⁰

The debtors in both *Pacific Lumber* and *Philadelphia Newspapers* attempted to confirm a Chapter 11 plan over the objection of an impaired secured creditor under § 1129(b)(2)(A) without providing the secured creditor with the right to credit bid at the sale of property.⁹¹ Both the Third Circuit and the Fifth Circuit’s held that the language of § 1129(b)(2)(A) unambiguously allowed debtors to conduct an asset sale under subsection (iii) as long as the court made a judicial determination that the resulting sale or auction provided the secured creditor with the indubitable equivalent of its total claim.⁹² In essence, both courts held that the specific language referring to asset sales in subsection (ii) does not control whether a debtor must proceed under the requirements of that subsection—i.e. each subsection of § 1129(b)(2)(A) has independent legal significance under which a debtor may cram down a Chapter 11 plan on an impaired secured creditor.⁹³

87. *Id.* at 239. Note holders would also receive any payments that result from a lien on the proceeds from an unrelated litigation along with any payments on its deficiency claim that come available after the sale. *Id.*

88. *Id.* at 238. The Fifth Circuit indicated that the secured creditor rejected the plan on the basis that it deprives the creditor of “the possibility of later increases in the collateral’s value.” *Id.* at 247. However, this case takes place during the recession of 2008 and the creditor likely wanted to delay the sale of the lands until after real estate market conditions improved.

89. 599 F.3d 298, 301-02 (3d Cir. 2010).

90. *Id.* at 302-303.

91. *See id.* at 312-313; *In re Pacific Lumber*, 584 F.3d at 245-46.

92. *See In re Philadelphia Newspapers*, 599 F.3d at 312-313; *In re Pacific Lumber*, 584 F.3d at 245-46.

93. *See, e.g., In re Philadelphia Newspapers*, 599 F.3d at 312-313; *In re Pacific Lumber*, 584 F.3d at 245-46.

b. RadLAX Gateway Hotel, LLC v. Amalgamated Bank

In 2007, RadLAX Gateway Hotel, LLC and its affiliate purchased a hotel and adjacent lot near Los Angeles International Airport.⁹⁴ RadLAX planned to renovate the hotel and build a parking structure on the adjacent lot.⁹⁵ In order to fund the initial purchase price and construction costs, RadLAX entered into a \$142 million dollar loan secured by a blanket lien on all of RadLAX's assets.⁹⁶ Faced with unexpected construction costs and limited ability to generate further liquidity, RadLAX filed for Chapter 11 protection in the fall of 2009.⁹⁷

Under RadLAX's proposed Chapter 11 plan, its assets were to be sold at auction prior to dissolution of the company.⁹⁸ The bidding procedures provided for an all-cash "stalking horse" bid in the region of \$55 million, and also required that all other bids be in cash as well.⁹⁹ The secured creditor objected to the bidding procedures—which denied the right to credit bid any amount of its approximately \$120 million claim—and RadLAX sought to confirm the plan over that objection under § 1129(b)(2)(A).¹⁰⁰ The bankruptcy court denied the sale on ground that the asset sale did not comply with any subsection of § 1129(b)(2)(A).¹⁰¹ The debtor appealed to the Seventh Circuit, which affirmed the Bankruptcy Court's denial of the sale.¹⁰²

The United States Supreme Court granted certiorari in *RadLAX* in order to resolve the circuit split concerning whether the subsection (iii) "indubitable equivalent" test could apply to asset sales.¹⁰³ Focusing on the plain meaning of the statute and availing itself of the general/specific canon, the Supreme Court held that an asset sale under a Chapter 11 plan must proceed under subsection (ii) governing asset sales.¹⁰⁴ Cram down under subsection (ii) requires a debtor to permit a secured creditor

94. *RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank*, 132 S. Ct. 2065, 2068 (2012).

95. *Id.*

96. *Id.*

97. *Id.* at 2068-69. In fact, by August 2009, Debtors still owed over \$120 million of the \$142 million loan, with over \$1 million in interest accruing each month. *Id.*

98. *Id.* at 2069.

99. *Id.* at 2069 & n.1.

100. *Id.* at 2069.

101. *Id.*

102. *Id.*

103. *Id.* at 2069-70.

104. *Id.* at 2071-72.

to credit bid.¹⁰⁵ Thus, the Supreme Court's holding in *RadLAX* supports a creditor's right to credit bid—subject to the aforementioned limitations of § 363(k)—in cases where a debtor wishes to sell the creditor's collateral without that party's consent.¹⁰⁶

While the *RadLAX* decision does not affect pre-plan asset sales, which proceed under § 363, its holding reinforces the importance of a creditor's right to credit bid to preserve the value of its claim.¹⁰⁷

II. DISASSEMBLING *IN RE FISKER AUTOMOTIVE HOLDINGS, INC.*

Looking at cases under § 363(k), courts have overwhelmingly supported the exercise of the right to credit bid absent particular facts that doing so would be collusive or contrary to the interests of all creditors.¹⁰⁸ In response to a line of cases that substantively impaired a creditor's right to credit bid its claim, the *RadLAX* decision sought to restore the presumptive right that Congress provided.¹⁰⁹ In contrast, the language in *In re Fisker Automotive Holdings, Inc.* limiting a creditor's right to credit bid on the basis that credit bidding will “freeze” the bidding contravenes both lines of cases;¹¹⁰ however, it is unclear what precedential weight will be given to *Fisker* going forward.¹¹¹

105. *Id.* at 2072.

106. *Id.*

107. *Id.* at 2070 n.2 (“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. That right is particularly important for the Federal Government, which is frequently a secured creditor in bankruptcy and which often lacks appropriations authority to throw good money after bad in a cash-only bankruptcy auction.”); *see also* *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440 (1937).

108. *See supra* Section I.B.

109. *RadLAX*, 132 S. Ct. at 2073 (“[N]othing in the generalized statutory purpose of protecting secured creditors can overcome the specific manner of that protection which the text of § 1129(b)(2)(A) contains.”); *see also id.* (“[T]he pros and cons of credit-bidding are for the consideration of Congress, not the courts.”); *In re Philadelphia Newspapers, L.L.C.*, 599 F.3d 298 (3d Cir. 2010); *In re Pacific Lumber, Co.*, 584 F.3d 229 (5th Cir. 2009); Hoffman, *supra* note 42, at 1245 (“[Section] 363(k) establishes an unambiguous foundation on which secured creditors can base their presumptive right to credit bid.”).

110. 2014 WL 210593, at *6 (Bankr. D. Del. Jan. 17, 2014); *supra* Section I.B.

111. *See Pinkas & Selby, supra* note 16, at 84.

A. THE FACTS OF THE CASE

Fisker Automotive (“Fisker”) was founded in 2007 as a manufacturer of high-end electric cars.¹¹² In an effort to subsidize the production of energy-efficient vehicles, the United States Department of Energy (the “DOE”) provided Fisker with initial funding of \$169 million, with an additional \$360 million available should certain benchmarks be met.¹¹³ Stemming from a series of unfortunate events—including safety recalls related to third party parts and the destruction of inventory in Hurricane Sandy—the DOE declined to extend financing past its initial outlay of \$169 million.¹¹⁴ In early 2013, Fisker began exploring its available options regarding a sale of the company.¹¹⁵ On October 11, 2013, the DOE sold its \$168.5 million claim against Fisker for \$25 million to Hybrid Tech Holdings (“Hybrid”)—a potential strategic acquirer of Fisker’s assets.¹¹⁶ After initial discussions between Fisker and Hybrid regarding an asset sale, Fisker filed for bankruptcy on November 22, 2013.¹¹⁷

Hybrid and Fisker entered into an Asset Purchase Agreement under which Hybrid would acquire substantially all of Fisker’s assets in exchange for a \$75 million credit bid through a private sale.¹¹⁸ In support of its proposed sale, Fisker represented that “the cost and delay arising from a competitive auction process or pursuing a potential transaction with an entity other than Hybrid would be reasonably unlikely to increase value for the estates.”¹¹⁹ Despite Hybrid’s uncontested status as successor to the DOE claim, the extent to which the DOE’s security interest was properly perfected remained at issue at the time of the proposed sale.¹²⁰ The unsecured creditors’ committee (the “Committee”) opposed the sale to Hybrid, favoring an auction between Hybrid and Wanxiang America Corporation (“Wanxiang”).¹²¹

112. *In re Fisker*, 2014 WL 210593, at *1.

113. *Id.*

114. *Id.*

115. *See* Pinkas & Selby, *supra* note 16, at 14.

116. *In re Fisker*, 2014 WL 210593, at *2.

117. *Id.* at *1-2. For a detailed history regarding the *Fisker* transaction, see Pinkas & Selby, *supra* note 16, at 14.

118. *In re Fisker*, 2014 WL 210593, at *2.

119. *Id.*

120. *Id.*

121. *Id.*

Prior to the hearing on January 10, 2014, Fisker and the Committee stipulated to a number of facts, including that: (1) if Hybrid's right to credit bid was either denied or capped at \$25 million¹²² then there would be "a strong likelihood" of an auction that would create "material value for the estate" above and beyond the proposed \$75 million private sale and (2) if Hybrid's right to credit bid was not limited, then Wanxiang would not bid more than Hybrid's asserted secured claims.¹²³ Additionally, the parties limited the scope of the Committee's objection to the sale to four grounds, including that:

(i) credit bidding should not be permitted here given that a material portion of the assets to be sold in their entirety are not subject to a property perfected lien in favor of Hybrid or are subject to lien in favor of Hybrid which is in bona fide dispute, which dispute cannot be quickly and easily resolved[;]

(ii) "cause" exists because limiting the credit bid will facilitate an open and fully competitive cash auction[;] or

(iii) "cause" exists because the Debtors' assets to be sold in their entirety include encumbered, unencumbered and disputed assets.¹²⁴

These stipulations set the stage from which Judge Gross bases his decision.¹²⁵

B. THE MODIFICATION OF BIDDING PROCEDURES AND ITS AFTERMATH

First, Judge Gross quickly disregarded the first ground on the basis that Hybrid—a bona fide purchaser—must be allowed to bid an amount equal to the amount it paid for its claim.¹²⁶ While, Judge Gross stated that the only issue remaining is whether "cause" exists to limit Hybrid's right to credit bid to only \$25 million,¹²⁷ he revisited the perfected lien

122. \$25 million represents the amount Hybrid purchased its claim for—i.e. the amount of money already invested in purchasing Fisker. *Id.*

123. *Id.* at *2-3.

124. *Id.* at *3.

125. *Id.* at *4 ("The Stipulated Agreements are highly significant to the credit bidding issue.").

126. *Id.*

127. *Id.*

issue to determine whether that could constitute “cause” to limit credit bidding.¹²⁸

Next, Judge Gross cites to *Philadelphia Newspapers* for the proposition that a creditor’s right to credit bid can be limited to “foster a competitive bidding environment.”¹²⁹ Applying this logic to the facts of the case, Judge Gross noted that a failure to limit Hybrid’s credit bid would extinguish any potential bidding.¹³⁰ It is upon this theory that Judge Gross explicitly limits Hybrid’s right to credit bid.¹³¹

Although Judge Gross already determined that the court should limit Hybrid’s credit bid, he went on to admonish Fisker for its expedited sale process—Fisker filed for bankruptcy three days prior to Thanksgiving and insisted on a confirmation hearing two days after the New Year.¹³² In particular, Judge Gross took umbrage with fact that a non-operating debtor sought to rush through a § 363 sale without a satisfactory reason as to why time was of the essence.¹³³

Lastly, Judge Gross revisited the dispute regarding the secured status of Hybrid’s claims.¹³⁴ Distinguishing *SubMicron*—a case where the full value of the creditors’ claim was deemed allowed—on the grounds that the extent to which Hybrid’s claim would be allowed had not yet been determined, Judge Gross held that the dispute over whether Hybrid’s claim was allowable also weighed against permitting a higher credit bid.¹³⁵

128. *Id.* at *5.

129. *Id.* at *4 (citing *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 316 n.14 (3d Cir. 2010)).

130. *Id.* at *5.

131. *Id.*

132. *Id.*

133. *Id.* Traditionally, pre-plan sales were only permitted for “perishable goods.” *In re Pedlow*, 209 F. 841, 842 (2d Cir. 1913); *Hill v. Douglass*, 78 F.2d 851, 853-54 (9th Cir. 1935) (approving the sale of road-making equipment of a contractor to prevent its repossession). In recent cases, courts have relaxed their interpretation of § 363(b) to allow pre-plan sales where the benefits of the sale are justified. *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983) (“[T]here must be some articulated business justification, other than appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business before the bankruptcy judge may order such disposition under section 363(b).”).

134. *In re Fisker*, 2014 WL 210593, at *5.

135. *Id.* (“The law leaves no doubt that the holder of a lien the validity of which has not been determined, as here, may not bid its lien.”) (citing *In re Danfuskie Isl. Props., LLC* 441 B.R. 60 (Bankr. D.S.C. 2010)).

In his conclusion, Judge Gross limited Hybrid's right to credit bid to \$25 million because a failure to do so would "freeze bidding."¹³⁶ He also noted that Fisker insisted on an "unfair process"—a process that included an expedited sale while the validity of the lien was still in dispute.¹³⁷

On February 18, 2014, Judge Gross approved the sale of Fisker's assets to Wanxiang for approximately \$149.2 million.¹³⁸ Wanxiang outbid Hybrid in an auction that lasted nineteen rounds.¹³⁹ At the hearing to confirm the Wanxiang sale, Judge Gross stated that "[t]he outcome of last week's auction 'shows that a fair process is a good thing.'"¹⁴⁰

III. WHAT THE IMPLICATIONS OF *FISKER* MEAN FOR THE FUTURE OF CREDIT BIDDING AND HOW MUCH WEIGHT THE OPINION SHOULD BE GIVEN GOING FORWARD

While *Fisker*'s holding does not explicitly contravene any relevant authority, it cuts against the traditional line of cases which suggest that "for cause" limitations on the right to credit bid exist on in exceptional circumstances.¹⁴¹ The *Fisker* decision is especially troubling in the wake of the Supreme Court's *RadLAX* opinion, which sought to protect the right to credit bid. In its aftermath, practitioners are unsure what the true takeaway of *Fisker* is—whether the decision creates additional bases for limiting a credit bid or whether the unique facts of this case make it distinguishable from traditional for cause cases.¹⁴² Additionally, it is

136. *Id.* at * 6.

137. *Id.* Judge Gross's observations about the sale process could indicate a suspicion of collusion between the Debtor and Hybrid. *Id.* Hybrid attempted twice to appeal the decision to limit its right to credit bid to no avail. See Stephanie M. Acree, *Bankruptcy Court's Decision to Limit Credit Bid to \$25 Million Not an Appealable Order*, BANKR. L. REP. (BNA), Feb. 20, 2014, at 1.

138. Dawn McCarthy, *Fisker Wins Approval for Sale of Assets to China's Wanxiang Group*, BANKR. L. REP. (BNA), Feb. 18, 2014, at 1. The Wanxiang bid included "\$126.2 million in cash, plus equity and \$8 million in assumed liabilities." *Id.*

139. *Id.*

140. *Id.*

141. See *supra*, Section I.B.1.

142. See Pinkas & Selby, *supra* note 16, at 14 ("[I]ts import and holdings might be more nuanced than the opinion sets out explicitly."); STROOCK & STROOCK & LAVAN LLP, CREDIT BIDDING IN THE WAKE OF FISKER AUTOMOTIVE 1 (Jan. 30, 2014); see also Joshua Gadharf, *May Secured Claim Purchaser Credit Bid the Full Face Value of Its Claim at a Bankruptcy Sale? Delaware Bankruptcy Court Says "Not So Fast"*,

unclear whether the frozen bidding was the determining factor or whether it was an amalgam of equally important factors.

First, Judge Gross indicated that the “for cause” basis to limit Hybrid’s credit bid was that a failure to do so would eliminate all other bidders.¹⁴³ Second, at the hearing itself, Judge Gross emphasized the fact that the perfection of the liens was still in dispute.¹⁴⁴ A third reason to limit credit bidding—although not expressly addressed in *Fisker*—may have been concerns of collusion between Fisker and Hybrid.¹⁴⁵ While the last two reasons are not inconsistent with other cases, finding cause when credit bidding would otherwise chill bidding has little to no authority to support it.¹⁴⁶ Broadly construed, this holding permits courts to cap credit bidding when it appears that the specter of a higher credit bid will scare away a potential bidder.¹⁴⁷ Regardless of the reason, Judge Gross’s language concerning the chilling effects of credit bidding will undoubtedly lead to more creditors challenging asset sales and more

MCDONALD HOPKINS BUS. ADVOCATE BLOG: BUS. RESTRUCTURING, (Jan 30, 2014 10:48:00 AM), <https://businessadvocate.mcdonaldhopkins.com>.

143. *In re Fisker Auto. Holdings, Inc.*, 2014 WL 210593, at *5 (Bankr. D. Del. Jan. 17, 2014); *see also In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 316 n.14 (3d Cir. 2010); Pinkas & Selby, *supra* note 16.

144. *See* Pinkas & Selby, *supra* note 16, at 85 (“Reading the opinion and hearing transcript together, one can argue that the failure to establish the validity and extent of Hybrid Tech’s liens constituted an independent basis to limit or refuse to permit a credit-bid.”); *see generally* Mankovetskiy, *supra* note 49, at 18 (“Only a creditor holding an allowed claim secured by a valid, perfected lien can credit bid for its collateral.”).

145. As early as April 2013, Fisker had contemplated an asset sale involving Wanxiang; however, that deal fell through when an affiliate of Hybrid and shareholder of Fisker reconsidered its offer of post-petition financing. Pinkas & Selby, *supra* note 16, at 14. Six months later, Hybrid has purchased the DOE claim at less than fifteen cents on the dollar and agreed to a purchase agreement with Fisker. Pinkas & Selby, *supra* note 16, at 14. Not only that, but the sale is expedited during the holiday season in an attempt to force it through. *In re Fisker*, 2014 WL 210593, at *5. While the facts were clearly insufficient to show actual collusion, Judge Gross may have considered this as further evidence warranting a limit on Hybrid’s credit bid. *See id.* (“[t]he Fisker failure has damaged too many people, companies and taxpayers to permit Hybrid to short-circuit the bankruptcy process.”).

146. *See In re Philadelphia Newspapers*, 599 F.3d at 315-16 (listing cases that illustrate the “for cause” limitation).

147. *See* Pinkas & Selby, *supra* note 16, at 84. *Cf.* Cohen v. KB Mezzanine Fund II, LP (*In re SubMicron Sys. Corp.*), 432 F.3d 448, 459-61 (3d Cir. 2006).

parties seeking to cap credit bids in the name of “competitive bidding.”¹⁴⁸

However, at the sale hearing Judge Gross expressed doubts as to whether this opinion should be applicable beyond the facts of the case.¹⁴⁹ In fact, Judge Gross stated, “[t]he Third Circuit has this procedure for issuing nonprecedential opinions. And those apply just to the parties and are not to be precedent. And I think that’s the case here.”¹⁵⁰ Yet, Judge Gross failed to expressly convey this sentiment in the *Fisker* opinion itself.¹⁵¹ Some practitioners have argued that the fact the opinion is currently unpublished also limits its precedential value.¹⁵² Given the fact that this case was highly fact specific—including the lengthy stipulation of facts and that bidding would be non-existent should a higher credit bid be permitted—it would not be surprising if the *Fisker* opinion is distinguished by courts in future cases.¹⁵³

CONCLUSION

On its face, the *Fisker* decision purports to limit credit bidding in an effort to promote an active auction process. While this may be true, a closer reading of the case shows several other causes for concern that may have independent legal significance. Even more nebulous is the potential impact this decision will have on the distressed debt market.¹⁵⁴

148. See Pinkas & Selby, *supra* note 16, at 85.

149. See *id.* at 84.

150. See *id.* (citing to the sale hearing transcript).

151. See *In re Fisker*, 2014 WL 210593; see also Pinkas & Selby, *supra* note 16, at 84.

152. See Pinkas & Selby, *supra* note 16, at 84.

153. *Id.*

154. STROOCK, *supra* note 142, at 3; see also Mankovetskiy, *supra* note 49, at 18 (“Today, credit bidding has evolved into a formidable offensive weapon available to private equity, hedge funds and other investors in distressed debt who frequently are able to acquire secured debt from existing creditors at a discount and then credit bid the full amount of that debt to acquire the collateral.”); Sam Roberge, *Maneuvering in the Shadows of the Bankruptcy Code: How to Invest In or Take Over Bankrupt Companies Within the Limits of the Bankruptcy Code*, 30 EMORY BANKR. DEV. J. 73, 74 (2013) (“Claims trading is a \$41 billion dollar per year industry. By way of comparison, the claims trading industry is larger than the market capitalizations of approximately 80% of all S&P 500 companies.”); Jared A. Wilkerson, *Defending the Current State of Section 363 Sales*, 86 AM. BANKR. L.J. 591, 604 n.63 (2012) (“For example, it is

Informational asymmetries and recovery risk already depress the prices of distressed debt.¹⁵⁵ Now, a purchaser must also worry whether he will be limited in his ability to credit bid.¹⁵⁶ The inability to credit bid up to the full value of a claim may be the difference between controlling the assets in demand and waiting in line to collect through distributions in bankruptcy—a non-starter for corporations seeking control instead of a meager return of capital.¹⁵⁷

Ultimately, *Fisker*'s main proposition—that a court may limit credit bidding to stimulate the bidding process—is likely distinguishable by the unique facts of the case.¹⁵⁸ But, until courts distance themselves from the *Fisker* holding, secured creditors and claims purchasers will have a headache dealing with motions to cap bidding in the interest of promoting fairness.¹⁵⁹

estimated that hedge funds and private equity firms alone, which are extremely active in the § 363 sale market, controlled more than \$2 trillion in assets as of 2007.”).

155. Daniel McNulty, INVESTOPEDIA, *Why Hedge Funds Love Distressed Debt*, Feb. 8, 2011, available at <http://www.investopedia.com/articles/bonds/08/distressed-debt-hedge-fund.asp>.

156. See Pinkas & Selby, *supra* note 16, at 85.

157. See Gadharf, *supra* note 142 (“The Bankruptcy Code allows secured creditors to credit bid so that they may control the sale of their collateral.”); Damian S. Schaible & Darren S. Klein, *Two New Cases Cast a Shadow Over Credit Bidding*, N.Y. L.J., June 23, 2014 (“Whether or not the *Fisker* . . . expansion of the ‘for cause’ limitation is ultimately adopted by other courts, in the near term, the increased uncertainty and additional lines of attack regarding credit bidding rights will likely negatively impact the market for secured claims of distressed companies.”).

158. See Pinkas & Selby, *supra* note 16, at 84. *But see In re Free Lance-Star Publishing*, No. 14-30315 (KRH), 2015 Bankr. LEXIS 1611, at *18 (Bankr. E.D. Va. April 14, 2014) (limiting a creditor’s right to credit bid for both traditional for cause reasons and reasons newly set forth in the *Fisker* case); Schaible & Klein, *supra* note 157 (examining the *Fisker* and *Free Lance-Star* decisions to determine precedential value of *Fisker* going forward).

159. See Pinkas & Selby, *supra* note 16, at 85.