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Errata 739

"(M)" is for Mootness: Statutory Mootness Under Section 363(m) 740
Michael T. Driscoll

LLC 1-2-3: The Debtor's LLC Membership Interest as Property of the Estate 770
Brandon J. Wilson

Journey to the Center of the Economic Universe: How the Current U.S. COMI Timing Determination Misses the Mark 783
Sarah Coleman and Jen Johnson

Notice, Participation, and Nonfeasance: *S. White Transportation* and Lien Stripping Under Section 114(c) 828
Shlomo Maza

Title Index for Volumes 19 through 23 837

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"(M)" is for Mootness: Statutory Mootness Under Section 363(m)

*By Michael T. Driscoll**

I. Introduction
II. The Purpose and Policy Foundations of Section 363(m)
  A. Statutory Mootness Under Section 363(m)
  B. The Foundations of Section 363(m)
  C. Other Mootness Concepts
  D. Rules of Bankruptcy Procedure That Interact with Section 363(m)
III. Whether the Transaction is Protected by Section 363(m)
  A. Transactions Under Section 363(f)
  B. Transactions Under Section 363(h)
  C. Transactions Under Section 365
IV. Whether the Challenge on Appeal is Moot by Section 363(m)
  A. Direct Challenges to Sale or Lease Orders
    i. The Per Se Rule
    ii. The Validity Exception
  B. Challenges to Related Provisions of Sale or Lease Order
  C. Collateral Challenges of the Sale or Lease Orders
V. Whether Good Faith Exists Under Section 363(m)
VI. Conclusion

I. Introduction

Section 363 of the Bankruptcy Code governs the use, sale, or lease of property by a trustee or, in the context of Chapter 11, a debtor in possession.[1] In recent years, sale transactions — often called "363 sales" — have become increasingly popular in Chapter 11 cases.[2] Regardless of the Bankruptcy Code chapter, section 363 sales are a powerful tool for a trustee or debtor in possession to quickly and efficiently bring value to an estate.

Section 363(m) encourages purchasers to offer the fair value of an asset by limiting the effect that appellate review can have upon authorized sales.[3] The plain language of section 363(m) is limited to conveyances by trustees (or

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debtors in possession in Chapter 11 cases) and not to conveyances by other sellers such as liquidating trustees in confirmed Chapter 11 cases.[4]

Circuit courts examining section 363(m) typically focus on one or more of the following issues: (1) whether the type of transaction authorized by the bankruptcy court was protected by section 363(m); (2) whether the remedy sought on appeal would affect the validity of the transaction; or (3) whether the purchaser's conduct constituted good faith. The purpose of this article is to examine the contours of each of these subjects in light of both historical and recent treatment by circuit courts. As discussed in this article, these courts do not always approach these questions similarly.

This article is organized as follows: Section II of this article provides a brief introduction and overview of mootness concepts and the purpose behind section 363(m). Next, Section III examines the types of transactions that are protected from reversal on appeal by section 363(m) including the section 363(f) provision allowing sales "free and clear" of interests in the property sold, the sale of non-debtor property under section 363(h), and the assumptions and assignments under section 365. Section IV, in turn, explores the analysis used by appellate courts to determine if the remedy sought would affect the validity of the sale or lease. Section V examines the manner that courts interpret good faith.

II. The Purpose and Policy Foundations of Section 363(m)

This Section provides a brief overview of section 363(m) including its background and purpose. The intent of this Section is to provide the reader with a firm foundation of the policy arguments that arise in the context of appeals of orders authorizing sale or lease transactions.

A. Statutory Mootness Under Section 363(m)

Section 363(m) was enacted with the creation of the Bankruptcy Code under the Bankruptcy Reform Act of 1978.[5] Section 363(m) provides that:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.[6]

The mootness provision of section 363(m) is often referred by courts as "statutory mootness."[7] It is one of two such statutory mootness provisions in the Bankruptcy Code. Section 364(e) — the second such provision — moots appeals that seek to reverse or modify a good faith creditor's extension of credit or attachment of liens authorized by an order that has not been stayed pending appeal.[8] As discussed later in Section IV(A)(ii) of this article, the interpretation of section 364(e)'s good faith provision has been influential in the manner that courts interpret section 363(m).[9]

Section 363(m) reflects Congress's strong preference for finality and efficiency of sale or lease transactions under section 363(b) or (c).[10] "Section 363(m) maximizes the purchase price of assets because without this assur-

ance of finality, purchasers would demand a large discount for investing in a property that is laden with the risk of endless litigation as to who has the rights to estate property."[11] By removing these risks, section 363(m) encourages interested investors to offer the fair value of the assets.[12] "Section 363(m)'s finality also strikes a balance between the creditor's interest and the purchaser's interest by producing value for the estate and preventing any modification or reversal of the bankruptcy court's authorization of the sale from affecting the validity of the sale."[13] Therefore, section 363(m) has been described as benefiting both creditors and debtors.[14]

Despite its benefits, section 363(m) is not without its critics. One author notes, "[t]he cost of a bond necessary to secure the stay pending appeal makes this provision practically unavailable in the context of major transactions."[15] The author also notes that section 363(m) "creates a strong incentive for the buyer and the seller to close and consummate the approved transaction before a stay can be obtained."[16] Another commentator notes that quick sales lend themselves to violations of due process:

> The expedited process of § 363 sales coupled with the mootness protection offers sophisticated debtors and buyers a mechanism to circumvent the rights of other parties-in-interest . . .. Notice and opportunity to be heard is a hallmark of due process rights, but given that § 363(m) bars any appeal after sale authorization, a creditor stripped of notice and an opportunity to be heard effectively has no rights or remedies whatsoever.[17]

These concerns are particularly acute because, despite the 14-day stay under Rule 6004(h), "[i]n practice, courts almost always eliminate the stay, given the debtor's push to complete the sale quickly."[18]

B. The Foundations of Section 363(m)

Section 363(m) traces its development to two judicial policies that predate the Bankruptcy Code.[19] The first, the "finality rule," encourages "finality in bankruptcy sales by protecting good faith purchasers and thereby increasing the value of the assets that are for sale."[20] Courts had long-sought to promote finality of judicial sales.[21] For example, the Second Circuit adopted a predecessor to this rule in 1914 in the context of a bankruptcy proceeding in *In re Burr Manufacturing & Supply Company* when it stated: "inadequacy of price, standing alone, is not sufficient ground for setting aside a sale, unless the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the court."[22] Today, the finality rule exists as a general policy underlying section 363(m), but it was particularly influential in the application of the "per se" rule, which is discussed in Section VI(A)(i) of this article.[23] The second policy has been called the "bankruptcy mootness rule"[24] or the "judicial mootness rule."[25] This mootness rule prohibits a court from adjudicating matters that, due to the absence of a stay pending appeal, prevent the court from providing a remedy.[26]

In 1976, the Judicial Conference of the United States officially incorporated these polices into the bankruptcy process by adding the following sentence to the then existing Rule 805 of the Federal Rules of Bankruptcy Procedure:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.[27]

In 1978, these concepts were codified into section 363(m) with the enactment of the Bankruptcy Reform Act, although section 363(m) was not identical to that of Rule 805.[28] In contrast to Rule 805, section 363(m) is limited to conveyances by trustees (or debtors in possession in Chapter 11 cases) and not, for example, to conveyances by liquidating trustees in confirmed Chapter 11 cases.[29] The legislative history of the Bankruptcy Reform Act provides only a brief mention relating to section 363(m) and it does not address the codification of certain Rule 805 concepts into section 363(m).[30]

In 1983, the Judicial Conference of the United States revised Rule 805 into Rule 8005.[31] The sentence that was added to Rule 805 in 1976 was eliminated.[32] Nevertheless, certain circuit courts — the Second, Sixth, and Eleventh Circuits — have found that the mootness rule in particular was not abrogated by section 363(m).[33] Accordingly, in addition to constitutional and equitable mootness discussed next in this Section, these circuit courts may also dismiss an appeal under the pre-Bankruptcy Code mootness rule where section 363(m) does not apply.

C. Other Mootness Concepts

Section 363(m) more broadly limits appellate review compared with constitutional mootness or equitable mootness.[34] Constitutional mootness is found under Article III of the U.S. Constitution.[35] Under Article III, judicial power requires the existence of a case or controversy.[36] In order to avoid constitutional mootness, a party must demonstrate: (1) a real legal controversy; (2) a genuine affect on an individual; and (3) the presence of sufficiently adverse parties.[37] Such cases will be moot if it is impossible for the court to grant effective relief.[38]

Equitable mootness is a lower court prudential concept that developed in bankruptcy law.[39] The Supreme Court has not addressed this doctrine.[40] Equitable mootness "allows a court to decline to hear a bankruptcy appeal, even when relief could be granted, if implementing the relief would be inequitable."[41] The principle has been applied when a party seeks relief on appeal that would, if granted, unravel a plan of reorganization that has been substantially consummated.[42] Courts construing equitable mootness in the context of plans of reorganization often employ multi-prong examinations, although the circuits differ regarding the specific approach and number of elements in the test for equitable mootness, as well as their relative weight.[43] Equitable mootness is sometimes considered as an alternative challenge to sale orders under section 363(m).[44]

D. Rules of Bankruptcy Procedure That Interact with Section 363(m)

Practitioners should be aware of several current Bankruptcy Rules that

interact with section 363(m). For example, Rule 6004(h) automatically stays an order authorizing the use, sale, or lease of property other than cash collateral for 14 days after its entry, unless the court orders otherwise.[45] Similarly, pursuant to Rule 8002(a)(1), a party has 14 days from the entry of a judgment, order, or decree to file a notice of appeal.[46] The filing of the notice of appeal, however, does not stay a bankruptcy court order.[47] Rather, parties must obtain a stay in order to avoid the strictures of section 363(m).[48]

Further, Rule 8005 governs the procedures for obtaining a stay pending appeal, including the posting of a supersedeas bond.[49] The supersedeas bond is designed "to preserve the status quo while protecting the non-appealing party's rights pending appeal."[50] It is discretionary with a court under Rule 8005 whether to require the appellant to file a bond or other appropriate security.[51] Merely posting a bond does not stay the order.[52] If the court requires a bond or other security, Rule 8005 does not indicate the amount required, although courts have required some proportion of the amount of the transaction at issue.[53] In one example, a bankruptcy court for the District of Delaware in *In re Tribune Co.* required the appellants contesting a plan of reorganization to post cash or a bond in the amount of $1.5 billion, which represented approximately 22 percent of the amount at risk.[54]

Rule 8005 is also silent as to the test for granting a stay pending appeal; however, courts typically employ a four-prong analysis: (1) whether the appellant is likely to succeed on the merits of the appeal; (2) whether the appellant will suffer irreparable injury absent a stay; (3) whether a stay would substantially harm other parties in the litigation; and (4) whether a stay is in the public interest.[55] Meeting these factors has been described as a "heavy burden" and "often unsuccessful."[56]

Finally, practitioners should be aware that Rule 60(b) of the Federal Rules of Civil Procedure, made applicable to most bankruptcy matters through Bankruptcy Rule 9024, may interact with section 363(m). Rule 60(b) authorizes the court, on certain bases, to grant relief from an order or judgment, and governs the procedure for a party to obtain such relief.[57] A court may relieve a party from an order, judgment, or proceeding due, among other reasons, to mistake, inadvertence, surprise, excusable neglect, new discovered evidence, or fraud.[58] A discussion of the interaction between section 363(m) and Rule 60(b) will be addressed in Section IV(C) of this article.[59]

III. Whether the Transaction is Protected by Section 363(m)

This Section examines the types of transactions that may be protected from reversal on appeal by section 363(m). The explicit statutory language of section 363(m) applies to sale or lease transactions authorized under section 363(b) or (c). Section 363(b) allows a trustee to use, sell, or lease property of the estate outside of the ordinary course of business after notice and hearing whereas under section 363(c) notice and hearing is not required for ordinary course transactions.[60] As discussed below, circuit courts have construed sale or lease transactions authorized under section 363(f), section

363(h), and section 365 to be protected from reversal on appeal by section 363(m).

A. Transactions Under Section 363(f)

Section 363(f) permits a trustee to sell property pursuant to section 363(b) and (c) "free and clear of any interest in such property of an entity other than the estate" subject to certain enumerated conditions.[61] The Eighth Circuit in *In re Polaroid Corp.* examined whether an order authorizing the sale under section 363(f) was protected from reversal by section 363(m).[62] In *Polaroid*, the bankruptcy court authorized the sale of the debtor's assets free and clear of any liens, including the appellants' liens of $300 million.[63] The appellants argued that section 363(m) did not protect an order that relied on the free and clear provision of section 363(f).[64] The Eighth Circuit held that section 363(m) applied to the transactions that utilized sections 363(f) because the explicit language of section 363(f) and the bankruptcy court order authorizing the sale referenced section 363(b) and (c).[65]

The Ninth Circuit BAP decision in *In re PW, LLC (Clear Channel Outdoor, Inc. v. Knupfer)* predates the *Polaroid* decision but it came to a different outcome on the issue of whether transactions authorized under section 363(f) are subject to section 363(m). In *Clear Channel*, the senior secured lender purchased the debtor's assets free and clear of liens through a court-supervised sale.[66] The junior secured lender objected to 1) the order authorizing the sale and 2) the order denying a stay pending appeal and finding that the senior secured lender was a good faith purchaser.[67] The junior secured lender appealed the orders to the Ninth Circuit BAP.[68] The Ninth Circuit BAP considered whether an appeal of a lien stripping provision authorized under section 363(f) was moot under section 363(m).[69] After examining the language of section 363(b) and (m), the court equated lien stripping under section 363(f) to a type of "use" that is allowed under section 363(b) or (c) but not protected by section 363(m).[70] The court stated, "[section] 363(m) address only changes of title or other essential attributes of a sale, together with the changes of authorized possession that occur with leases. The terms of those sales, including the 'free and clear' term at issue here, are not protected."[71] Congress, the court noted, would have included "transfers" in the types of transactions mooted by section 363(m) if it intended to protect lien stripping.[72] Accordingly, the court allowed the appeal to proceed.[73]

To date, *Clear Channel* has been criticized by courts[74] and commentators[75] alike. For example, the Sixth Circuit BAP has called the rationale behind *Clear Channel* "an aberration in well-settled bankruptcy jurisprudence applying § 363(m) to the 'free and clear' aspect of a sale under § 363(f)." Specifically, the court criticized the *Clear Channel* decision because it did not cite case law for its decision that went against the "overwhelming weight of authority" that section 363(m) is a bar against appeals of transactions authorized under section 363(f).[76] Regardless of whether the result of *Clear Channel* is controversial, no circuit court has adopted the notion that transactions authorized under section 363(f) are not

protected against reversal on appeal by section 363(m).

B. Transactions Under Section 363(h)

Section 363(h) permits a trustee, subject to certain limitations, to sell the property of co-owners.[77] Just as section 363(m) has been held to apply to orders relying on section 363(f), it has also been held to apply to orders under section 363(h). In *Nashville Sr. Living, LLC*, the Official Committee of Unsecured Creditors filed an appeal to the Sixth Circuit of an order allowing the debtors to sell seven properties co-owned by approximately thirty tenants in common.[78] After examining the statutory interplay between subsections (b) and (h) of section 363, the court concluded that transactions under section 363(h) are protected by section 363(m).[79] The court noted that "Subsection (h) expressly invokes a trustee's authority to sell property under subsection (b) or (c). Thus, a sale that implicates subsection (h) is just one type of sale under subsection (b) or (c)."[80] This decision suggests that other types of transactions authorized under section 363 may be protected by section 363(m) in the absence of a stay.

C. Transactions Under Section 365

Section 365 allows a trustee to assume and assign or reject any executory contract or unexpired lease of the debtor subject to bankruptcy court approval and certain restrictions under section 365.[81] Several circuit courts have considered whether appeals of orders authorizing transactions under section 365 were protected against reversal on appeal by section 363(m). For example, in *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, the Third Circuit considered whether an assignment of a franchise agreement under section 365 was protected by section 363(m).[82] In that case, a Chapter 11 debtor received approval to assume and assign three of its franchise agreements under section 365 and, subsequently, to sell those franchises under section 363(b).[83] The parties affected by the transactions appealed the district court's decision that affirmed the bankruptcy court.[84] Beginning its analysis, the Third Circuit noted that the franchises were interests in property under both section 541 and state law.[85] As property of the estate, the conveyance of that property was governed by section 363, "although the procedure for their transfer [was] delineated by section 365."[86] Accordingly, the court held that an appeal from an order authorizing an assignment of an executory contract is barred by section 363(m).[87]

Subsequent to *Krebs*, circuit courts have extended this analysis so that section 363(m) prevented reversal upon appeal of assumption and assignments of leases[88] and executory employment agreements[89] and contracts[90] under section 365. Similarly, in 2013, the Sixth Circuit in *Sears v. Badami (In re AFY)* held that orders approving assumptions under section 365, in the absence of an assignment, are protected from reversal on appeal by section 363(m).[91]

IV. Whether the Challenge on Appeal is Moot by Section 363(m)

This section discusses the analysis used by circuit courts in examining ap-

peals in the following circumstances: (a) direct challenges to an order authorizing a sale or lease order; (b) challenges of a related provision to the sale or lease order; and (c) collateral challenges to the sale or lease order.

A. Direct Challenges to Sale or Lease Orders

In construing when an appeal is statutorily moot under section 363(m), courts generally adopt one of two constructions — the "per se" rule or the "validity exception."[92] As an outlier, the Sixth Circuit, in a series of opinions, declined to adopt either approach.[93]

i. The Per Se Rule

The per se rule is the majority view[94] and has been adopted by the First, Second, Fourth, Fifth, Seventh, Ninth, Eleventh, and District of Columbia Circuits.[95] Under this approach, assuming no issue as to the purchaser's good faith, an appeal concerning a transaction cannot be overturned on appeal in the absence of the stay.[96] Courts adopting this approach generally view section 363(m) as a jurisdictional bar in deciding whether the order is appealable.[97] The rationale for this approach arises out of the finality and efficiency policies of section 363(m) that were discussed in Section II(A) of this article.[98]

This per se rule's bar may even extend where the bankruptcy court erred in authorization of a sale, if, for example, an appellant argues that the assets sold were not property of the estate.[99] This is not to suggest that the purchaser's lack of good faith would preclude a circuit court from reviewing the transaction on appeal. In the absence of a stay, circuit courts do retain authority on the issue of good faith of the purchaser;[100] however, as a practical matter, if the good faith issue is not raised at the bankruptcy court level, circuit courts will typically decline to adjudicate the issue.[101] The issue of good faith is examined more closely in Section V of this article.[102]

Although referred to as the per se rule, case law suggests that this viewpoint may not be as absolute as it appears. For instance, the Second Circuit in its 2010 *In re Westpoint Stevens, Inc.* decision, while adopting the per se rule, left open the possibility of a narrow exception "for challenges to the Sale Order that are so divorced from the overall transaction that the challenged provision would have affected none of the considerations on which the purchaser relied."[103] Further, the Ninth Circuit in *In re Onouli-Kona Land Co. v. Richards* carved out an exception where the transaction involved real property that is subject to a state law statutory right of redemption.[104] Similarly, the Seventh Circuit in *Matter of Lloyd* determined that an appeal to obtain sale proceeds under a state law homestead exemption statute could continue if the proceeds had not been distributed.[105]

Despite the possible exceptions to the per se rule in *Westpoint Stevens*, *Onouli-Kona*, and *Lloyd*, practitioners in the circuits following the per se rule should remain aware of the rule, especially at the bankruptcy court level. As noted above, failure to obtain a stay is typically fatal to a subsequent appeal to overturn the sale.

ii. The Validity Exception

The second approach, followed by the Third, Eighth, and Tenth Circuits examines whether the relief sought by the appellants would affect the validity of the sale or lease.[106] This view arose out of the Third Circuit's analysis of section 364(e) — a provision that contains similar language to section 363(m). In *Krebs*, discussed above in Section III(C) in the context of whether an appeal of an assumption of franchise agreements under section 365 was precluded by section 363(m),[107] the Third Circuit stated that section 363(m) does not moot every appeal in the absence of a stay.[108] The court adopted this position after examining its interpretation of section 364(e) in a prior case, *RTC v. Swedeland Development Group, Inc. (In re Swedeland Development Group, Inc.)*.[109]

In *Krebs*, the Third Circuit fashioned two prerequisites required to moot an appeal under section 363(m): (1) the underlying appeal was not stayed pending appeal; and (2) the reversal or modification of authorization to sell or lease would affect the validity of such a sale or lease.[110] This two-prong approach has been adopted by the Eighth Circuit;[111] however, the Tenth Circuit appears to rely solely on the latter prerequisite.[112]

In any case, the operative test for all three circuits — whether the appeal would affect the validity of the sale or lease — appears in practice to be approached differently by the Third and Eighth Circuits compared with the Tenth Circuit. In nearly all of the cases reviewed by the Third[113] and Eighth[114] Circuits, the courts determined that the relief sought by the appellants would affect the validity of those orders and therefore dismissed the appeals. For example, subsequent to the court enunciating the two-prong analysis in *Krebs*, the Third Circuit's decision in *Cinicola v. Scharffenberger* appears to be the only known instance where the court did not moot an appeal.[115] In that case, the court remanded the matter to the district court to determine whether the relief sought would affect the validity of the transaction.[116]

The Tenth Circuit, on the other hand, appears to be the more willing to find that the appeal was not moot on the grounds that the relief sought did not affect the validity of the sale or lease. For example, in *In re Osborn (Osborn v. Durant Bank & Trust Co.)*, the Tenth Circuit in 1994 considered whether an order authorizing the sale of real property to a third party was moot.[117] The appellants sought recovery of the homestead exemption from the proceeds of the sale of their Texas property, which was authorized by the bankruptcy court.[118] The Tenth Circuit noted that it examined both the Bankruptcy Code and state law to determine whether the remedies available to the appellants would affect the validity of a sale.[119] The court noted that under a 1974 Texas Supreme Court case, Texas state courts may employ equitable powers to impose a constructive trust on funds held improperly by a party.[120] As it was "not impossible for the court to grant some measure of effective relief," the court held that the appeal was not moot.[121]

In a similar circumstance, the Tenth Circuit in 1997, in *Golfland Entertainment Centers, Inc., v. Peak Investment, Inc.* (*In re BCD Corp.)*, held that an appeal of the sale order seeking recovery of sale proceeds was not moot

because Utah state law allowed the imposition of constructive trusts.[122] The equitable relief was still possible because, as raised exclusively at oral argument before the appellate panel, the sale proceeds were not disbursed but were in an identified money market account.[123]

In yet another example, in *In re Paige (Search Market Direct, Inc. v. Jubber)*, the Tenth Circuit in 2012 held that the appeal of a sale of an internet domain name was not moot because the sale order contained a provision stating that the purchaser acquired the property subject to the defenses of another litigant.[124] Though this appears to be a narrow ruling that was based solely on the language of the sales order, it is nevertheless consistent with the *Osborn* and *BCD Corp.* cases.

Two appeals arising from the Chapter 7 case of *In re C.W. Mining Co.* further demonstrate the Tenth Circuit's approach to appeals potentially subject to section 363(m). In *C.O.P. Coal Development Co. v. C.W. Mining Co. (In re C.W. Mining Co.) ("C.W. Mining I")*, the Tenth Circuit, on direct appeal from the bankruptcy court, considered whether an appeal of an operating agreement sale was statutorily moot.[125] The operating agreement permitted the debtor to mine and remove coal from land owned and controlled by C.O.P. Coal Development Company ("COP").[126] The Chapter 7 trustee received permission to assume and sell the operating agreement to a third party.[127] COP did not file its appeal to the sale order until after the sale had closed and thus no stay existed.[128] The Chapter 7 trustee then sought dismissal of the appeal under section 363(m).[129]

The Court determined that the appeal was not moot because COP, the appellant, could still pursue a remedy that would not affect the validity of the sale.[130] The court noted that COP "suggested" at oral argument that monetary relief was a potential remedy if the appeal was allowed to proceed.[131] The court placed the burden of showing mootness on the trustee and determined that he failed his burden because he did not "affirmatively foreclose the possibility that COP might be entitled to alternative relief that would not affect the validity of the sale."[132]

The Tenth Circuit's approach in *C.W. Mining I* is interesting in two respects. First, the court's opinion cites statements made by COP at oral argument that were disputed by the trustee regarding the potential remedy available to COP if the appeal was permitted to proceed.[133] This represents the second time — the first case being *BCD Corp.* discussed above — where the court cited statements made at oral argument in its rationale to not dismiss an appeal. Second, the court had never previously used the phrase "affirmatively foreclose" to describe the burden on the trustee to prove mootness. The court's use of this phrase appears to have developed from a Ninth Circuit decision in *Suter v. Goedert*.[134] In *Suter*, the Ninth Circuit considered whether an appeal of a motion to stay a settlement of a malpractice claim was properly mooted by the lower courts.[135] The Ninth Circuit stated that the party advocating mootness must "affirmatively demonstrat[e]" that the appellants have no recourse under state law.[136] The adoption of this standard by the Tenth Circuit in *C.W. Mining I* is notable because the *Suter*

decision was not governed by section 363(m) as it did not involve a sale or lease.[137]

A second appeal in the case arose recently in the 2014 decision in *Rushton v. ANR Co. (In re C.W. Mining Co.) ("C.W. Mining II")*.[138] In *C.W. Mining II*, the court considered four appeals arising out of the Chapter 7 trustee's adversary proceeding relating to recovery of estate assets, which were ultimately sold and subject to the separate appeal in *C.W. Mining I*.[139]

Prior to the sale in *C.W. Mining I*, the bankruptcy court entered an order requiring the return of estate property to the trustee.[140] Four parties affected by the adversary proceeding appealed to the district court.[141] After the Tenth Circuit entered its decision in *C.W. Mining I*, but before the district court decided the appeal of the adversary proceeding, the trustee and the third party purchaser filed motions to dismiss the appeals at the district court as moot under statutory and equitable principles.[142] The district court agreed and the four appellants sought relief before the Tenth Circuit.[143]

On appeal, the Tenth Circuit clarified that while the trustee bears the burden of proving mootness, this burden does not require the trustee to "disprove every possible legal remedy imaginable."[144] The appellants must at least identify an available remedy that would not affect the sale's validity.[145] Unlike the direct appeal in *C.W. Mining I*, the court stated that its review was limited to the matters litigated at the district court.[146]

Two of the four appeals were held to be moot because the appellants had not identified remedies at the courts below that would support their claims for equitable remedies such as a constructive trust.[147] With respect to another appellant, the Tenth Circuit affirmed the district court's dismissal; however, it disagreed with the district court's rationale.[148] The district court relied on a Tenth Circuit unpublished decision in *Freightliner, LLC, v. Central Refrigerated Service, Inc., (In re Simon Transportation. Services, Inc.)*,[149] where the court mooted an appeal because the sale proceeds were not segregated.[150] The Tenth Circuit rejected the bright line approach in *Simon* by holding that segregation of assets was not required to avoid affecting the sale's validity.[151] Despite the rejection of the district court rationale, the Tenth Circuit agreed with the dismissal of the appeal because the trustee demonstrated that a constructive trust was not available.[152]

The Court did, however, permit the appeal by Charles Reynolds to proceed.[153] Reynolds, a company employee prior to the bankruptcy, asserted a $175,000 claim against the estate for improvements he made to his company-owned residence.[154] The court did not dismiss his appeal because Reynolds did not challenge the validity of the sale order.[155] Rather, he sought to receive the value of his improvements, which the court noted may be permitted under a Utah statute.[156]

C.W. Mining II is notable in that the Tenth Circuit did not require the trustee to "affirmatively foreclose" every possible remedy that could affect the sale to achieve mootness. The court did not explain the difference in its approach other than to state that *C.W. Mining I* was a direct appeal while

C.W. Mining II reviewed a district court opinion.[157] In any case, when viewed in line with *Osborn*, *BCD Corp.*, the *C.W. Mining* cases suggest reluctance by the Tenth Circuit to conclude that appeals have been mooted by section 363(m) when compared with other circuit courts. Nevertheless, practitioners in the Third, Eighth, and Tenth Circuits should remain focused that an appeal not accompanied by a stay must still demonstrate that the remedy sought will not affect the validity of the sale or lease.

B. Challenges to Related Provisions of Sale or Lease Orders

In addition to appeals directly challenging sale or lease orders, courts have considered whether a provision "related" to the sale or lease order was rendered moot by section 363(m). This analysis centers on whether a challenged related provision was integral to the sale or lease order and that removing the provision would adversely affect the terms of that order.[158]

For example, in *Anheuser-Busch, Inc., v Miller (In re Stadium Management Corp.)*, the First Circuit considered whether an appeal of motions related to the sale order were moot.[159] In this case, the Chapter 11 trustee received bankruptcy court approval to conduct a sale of all of the debtor's assets.[160] At the same time that the bankruptcy court approved the sale order, the court also approved ten other related motions including a motion to approve a sublease assumption and assignment and a motion to reject an advertising agreement.[161] No parties sought a stay or filed an appeal of the sale order.[162] Later, the parties affected by the assumption and assignment motion and the rejection motion filed appeals of those orders.[163] The appellants argued that section 363(m) did not preclude their appeals because they appealed the related motions and not the sale order itself.[164]

The First Circuit disagreed.[165] The court characterized the appellants' argument as an "attempt to squeeze around the direct bar [of section 363(m)] by distinguishing the sale motion from the related motions."[166] Noting that the related motions and the sale motions were a "package," the court held that it could not fashion relief to the appellants without unraveling the sale.[167]

Similarly, the Second[168] and Eighth[169] Circuits have ruled that appeals of related provisions may render moot under section 363(m) an appeal from an order authorizing a sale. As this is a fact-intensive approach, this does not suggest that these circuits or other circuits would consistently rule in the future. Indeed, in a case of first impression, the Fifth Circuit in 2013 considered an appeal of a related provision in *Newco Energy v. Energytec, Inc. (In re Energytec, Inc.)* and determined that an appeal of a related provision was not moot.[170]

In *Energytec*, the debtors sought approval of a sale of substantially all of the debtors' assets including a pipeline system.[171] Newco Energy ("Newco") objected on the grounds that the debtor could not eliminate its security interest and lien on a transportation fee associated with the pipeline without consent.[172] The bankruptcy court allowed the sale to proceed but reserved Newco's objection to the sale for later determination.[173] More than a year after the sale occurred, the bankruptcy court entered an order finding that

Newco's transportation fee did not run with the land and therefore the sale was free and clear of Newco's claim.[174]

Newco appealed this order to the Fifth Circuit after the district court affirmed the bankruptcy court's ruling.[175] The Fifth Circuit noted that the purchaser bought the assets despite the reservation to Newco's objection in the sale order.[176] If the purchaser wanted the assets free and clear of Newco's claim, the court observed, it could have declined to go forward with the sale.[177] This demonstrated to the court that the free and clear provision was not integral to the sale order and therefore the appeal was not moot.[178]

Despite *Energytec*, practitioners representing a party affected by a provision or motion relating to an order authorizing a sale or lease, must remain cognizant that their interests may be inextricably linked to the sale or lease. Therefore, these parties should attempt to preserve their objection and, if possible, sever the contested transaction or provision from the sale or lease so that they are not viewed as a "package" as in *Stadium Management*.

C. Collateral Challenges of the Sale or Lease Orders

As noted above in Section II(D) of this article,[179] Rule 60(b) of the Federal Rules of Civil Procedure, allows a party to seek relief from an order, judgment, or proceeding under a limited number of circumstances.[180] Motions under Rule 60(b) are often called "collateral attacks."[181] Collateral attacks are not appeals; however, the interplay between section 363(b) and Rule 60(b) arises when a party appeals the approval or denial of the Rule 60(b) motion that seeks to directly or indirectly unwind the sale or lease transaction that has already occurred.

Several circuit courts have weighed in on whether Rule 60(b) may be used to unwind a sale or lease transaction. Recently, the Eleventh Circuit in August 2014 in *Wortley v. Chrispus Venture Capital, LLC (In re Global Energies, LLC)* reversed the bankruptcy court's denial of a Rule 60(b) motion that sought relief from an earlier denial of a motion to dismiss, holding that under the circumstances the bankruptcy court should have dismissed the case or voided the sale under section 363(m).[182] This case commenced when Chrispus Venture Capital, LLC ("Chrispus") filed an involuntary Chapter 7 case against Global Energies, LLC.[183] The Chapter 7 trustee sold the assets to Chrispus through a court approved sale.[184] Prior to the sale, Joseph Whortley, an owner of the debtor, filed a motion to dismiss the case because he suspected that his co-owners, James Juranitch and Richard Tarrant, had colluded to have Chrispus file the involuntary case.[185] When Juranitch and Turrant denied colluding under oath, Whortley withdrew his motion to dismiss.[186] Whortly later renewed his motion to dismiss but the bankruptcy court denied his motion with prejudice on the grounds of insufficient evidence.[187] On the basis of newly-discovered e-mails that appeared to show Juranitch and Turrant developed plan to file the involuntary petition, Whortley filed a Rule 60(b) motion to revisit the motion to dismiss.[188] The bankruptcy court denied the Rule 60(b) motion and the district court affirmed that decision.[189]

On appeal, the Eleventh Circuit determined that the bankruptcy court clearly erred because the e-mails produced by Whortley showed that the Juranitch and Turrant acted in bad faith by filing the involuntary petition.[190] The court concluded that the bankruptcy court, in light of the new evidence, should have dismissed the case or, alternatively, reversed the determination of good faith under the sale order and voided the sale under section 363(m).[191] In reversing and remanding the lower court decisions, the Eleventh Circuit instructed the bankruptcy court to void the sale and to conduct a hearing on sanctions against Chrispus, Juranitch, and Turrant.[192]

On different facts but supporting the validity of Rule 60(b) relief in the face of section 363(m), the District of Columbia Circuit in *Hope 7 Monroe Street Ltd. Partnership v. Raiso, LLC (In re Hope 7 Monroe Street Ltd. Partnership)* held that section 363(m) does not preclude a Rule 60(b) collateral attack.[193] In this February 2014 decision, the court rejected the appellee's argument that a Rule 60(b) motion seeking relief from the proof of claim and the sale distribution orders was moot under section 363(m).[194] The court noted that section 363(m) was irrelevant because the appellant did not seek Rule 60(b) relief from the sale order but rather from the orders concerning the sale proceeds.[195] The court stated, "even if § 363(m) did affect an appellate court's review of an order approving the distribution of funds, it would not preclude a collateral attack [under Rule 60(b)] on that order."

Similarly, the Fourth Circuit in a 1992 unpublished table decision in *Alan Gable Oil Development Co. v. Hoyer (In re Alan Gable Oil Development Co.)* considered whether section 363(m) moots a Rule 60(b) collateral attack of a sale order under section 363(b).[196] The Fourth Circuit ruled that section 363(m) is limited to appeals of sale orders and not to collateral attacks.[197] The court rationalized its view by noting, "to hold otherwise would be to make collateral relief under Rule 60(b) effectively unavailable against an entire category of bankruptcy court orders, a result that could not be reconciled, we think, with Fed. R. Bankr. P. 9024."[198] In the same year that *Alan Gable* was decided, the Seventh Circuit in *Edwards v. Golden Guernsey Dairy Co-Op (In re Edwards)* similarly ruled that section 363(m) does not moot an appeal of a denial of a Rule 60(b) motion to vacate a sale order.[199]

In contrast, the Second Circuit appears to have broken the unanimity of the *Global Energies*, *Hope 7 Monroe*, *Alan Gable*, and *Edwards* decisions in its unpublished decision *In re Adelphia Communications Corp.* In *Adelphia*, the appellants challenged the district court's order affirming the bankruptcy court's approval of certain settlements.[200] The appellees claimed that the appeal was equitably moot, or alternatively, moot under section 363(m) because the appeal sought to collaterally challenge the sale order.[201] In dismissing the appeal, the Second Circuit stated in a brief footnote, "[a]ny other form of relief, i.e., rescission of the agreements, would constitute an impermissible collateral challenge of the 363 orders."[202] Although not dispositive on the issue, this statement suggests that, at least for the Second Circuit, section 363(m) may moot collateral attacks against sale or lease orders.[203] However, practitioners are cautioned against overreliance on *Adel-*

phia as this was an unpublished decision with minimal coverage of section 363(m).

V. Whether Good Faith Exists Under Section 363(m)

This Section explores the analysis of good faith under section 363(m). The Bankruptcy Code does not define the term "good faith."[204] The term is applied in different contexts under the Bankruptcy Code. For example, under section 1129(a)(3), courts have found good faith when the plan of reorganization is likely to achieve its goals and when those goals are consistent with the Bankruptcy Code's purposes.[205] Similarly, the good faith provision of section 1126(e) has been implicated where, for example, a competitor "purchased the claims as votes it could use as levers to bend the bankruptcy process toward its own strategic objective" rather than in protecting its own claim.[206]

In the context of section 363(m), there is no agreement among the circuits on what constitutes good faith; however, there appears to be a consensus that good faith is destroyed by "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders."[207] On the other hand, certain courts have adopted the traditional equitable definition of good faith as one who purchases the assets for value, in good faith, and without notice of adverse claims.[208] Under some case law, the value component to this definition is met if the purchaser acquires the assets for 75 percent of its appraised value[209] or purchased the assets at an auction.[210] There are different views among some circuit courts on whether a purchaser's knowledge of a pendency of appeal constitutes "notice of adverse claims." The Fourth and Sixth Circuits appear to take the position that a purchaser's good faith is not destroyed due to knowledge of an adverse claim because doing so could conflict with the explicit language of section 363(m).[211] On the other hand, the Fifth Circuit in September 2014 in a per curiam decision *In re TMT Procurement Corp. (TMT Procurement Corp. v. Vantage Drilling Corp.)* held that the good faith status of a purchaser under section 363(m) or a lender under section 364(e) may be denied where the purchaser had "knowledge that a third-party, entirely unrelated to the bankruptcy proceedings, had an adverse claim."[212]

Similar to a lack of consensus concerning a definition of good faith, there is no unanimity on whether the bankruptcy court is required to make a finding of good faith. For example, in *In re Abbotts Dairies of Pennsylvania (Cumberland Farms Dairy, Inc. v. National Farmers' Organization, Inc.)*, the Third Circuit remanded an appeal to the bankruptcy court and explicitly required the bankruptcy court and future courts authorizing section 363(b) asset sales to make a finding of good faith for three reasons.[213] First, the bankruptcy court, given its familiarity with the proceedings, represents the best forum to make such a determination.[214] Second, such a finding promotes finality because it places a prospective appellant on notice of the need to obtain a stay pending appeal.[215] Third, analogizing to the scrutiny required of a good faith determination under section 1129(a)(3), a finding of good

faith prevents the abrogation of Chapter 11 protections that are designed to benefit creditors.[216] By remanding the matter to the bankruptcy court, this suggests that failure by future bankruptcy courts to make such findings will similarly result in remand. Further, the court's requirement of a bankruptcy court to "make a finding" suggests that the bankruptcy court must actively make a factual determination rather than simply including a reference to the purchaser's good faith in the sale or lease order.[217]

In contrast, the Ninth Circuit does not require an explicit finding of good faith[218] because such finding may be premature at the time of the sale.[219] The Sixth Circuit, in the context of section 364(e), requires explicit findings of good faith by the bankruptcy court; however, the court has not addressed whether a similar requirement exists for section 363(m).[220]

The issue of whether such a finding is required is significant for two reasons. First, the circuit court may decline to consider a finding of good faith where the issue was not contested at the lower court.[221] Second, if the bankruptcy court scrutinized the issue and found no bad faith, the circuit court may be more deferential because most courts will employ a clearly erroneous standard of review to a bankruptcy court's finding of fact on good faith.[222] Indicative of this deferential standard, the Supreme Court has noted, "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[223] On the other hand, the Second and Sixth Circuits have adopted a de novo standard in reviewing determinations of good faith.[224]

The alleged misconduct by a purchaser is limited to the bankruptcy proceeding.[225] Good faith may be shown by the integrity of the sale proceeding.[226] It is not implicated by the purchaser's general business practices.[227] The purchaser's status as an insider[228] or creditor[229] does not preclude the court from making a good faith finding.

Where a party does engage in collusive bidding, section 363(n) permits a trustee to avoid a sale.[230] This may occur where the sale price was the result of an agreement among bidders.[231] It has been suggested that "[section] 363(m) acts as a shield to protect good faith purchasers from having a consummated sale reversed, while [section] 363(n) acts as a sword that empowers the Trustee to avoid a sale if the sale price resulted from an understanding between potential bidders at the sale."[232]

The Second Circuit's analysis in *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)* illustrates the limited scope of the good faith analysis of a purchaser's conduct even under the de novo standard of review.[233] In *Gucci*, the Second Circuit considered whether a buyer of a designer's trade name and licenses constituted a good faith purchaser under section 363(m).[234] Paolo Gucci, a former principal designer for Guccio Gucci, filed for Chapter 11 protection.[235] Prior to the filing, Paolo Gucci and Guccio Gucci were engaged in protracted litigation regarding the use and marketing of Paolo Gucci's trade name.[236] After the litigation was resolved, Paolo Gucci entered into various licensing

agreements under an allowed trade name.[237]

A Chapter 11 trustee was appointed and a drawn out sales process commenced where Guccio Gucci eventually prevailed as the purchaser.[238] The sale order entered by the bankruptcy court included a finding that Guccio Gucci was a good faith purchaser.[239] Various unsuccessful bidders appealed the sale order to the district court, which refused to issue a stay and affirmed the bankruptcy court.[240] On appeal to the Second Circuit, the bidders argued that Guccio Gucci was not a good faith purchaser due to: (a) its global litigation against licensees that resulted in devalued trademarks; (b) its efforts to obtain property outside the scope of the estate; (c) its alleged collusion with the trustee; and (d) its purchase of the estate asset with the intent to destroy the assets violated public policy.[241]

In considering the issue de novo, the Second Circuit reiterated that its analysis of Guccio Gucci's good faith centered on whether its conduct amounted to controlling the sale price or taking unfair advantage of potential bidders.[242] While noting that the result of the sale process was "unsettling," nothing in the record showed that Guccio Gucci's aggressive approach reflected anything other than an established business strategy.[243] As a result, the court found no indicia of bad faith and therefore affirmed the bankruptcy and district courts.[244]

Gucci suggests that reliance on bad faith arguments on appeal is tenuous at best even under the Second Circuit's de novo standard. Given the limited scope of the review of conduct during the sales proceeding and the clearly erroneous standard of review used by most courts, it is an uphill battle to prevail on such an argument. Therefore, practitioners suspecting fraud, collusion, or unfair bidding should attempt to aggressively build a record at the bankruptcy court level to prevent a finding of good faith. Failure to do so may prove fatal on appeal.

VI. Conclusion

As discussed in this article, the issues for circuit courts construing section 363(m) are three-fold. First, courts will examine the type of transaction to determine whether section 363(m) applies. Section 363(m) has been held to moot appeals of transactions that rely upon section 363(f), section 363(h), or section 365.

Second, courts examine whether the remedy sought on appeal would affect the validity of the sale or lease. For appeals challenging the actual sale or lease, courts may apply the per se rule that virtually moots all appeals not accompanied by a stay or the validity exception that scrutinizes the remedy sought. For appeals of related provisions to the sale or lease order, courts will examine whether the contested related provision was integral to the sale or lease order to such an extent that allowing the appeal would effectively unwind the sale or lease. Moreover, with respect to collateral attacks, several circuits hold that section 363(m) does not moot Rule 60(m) challenges to sale or lease orders; however, an unpublished decision by one circuit offers a different view.

Third, courts examine a purchaser's good faith. As noted above, the scope of good faith is typically limited to the purchaser's conduct during the sales process. Most circuit courts apply a clearly erroneous standard that is deferential to the bankruptcy court's finding of fact that the purchaser acted in good faith.

The contours of section 363(m) are evolving. The key lesson is that the issue at hand must be well researched to determine the specific view of the circuit in which the bankruptcy case is venued. Armed with this information, practitioners can attempt to shape the arguments in their favor at the bankruptcy court level so that the position favoring the client may be realized in the event of an appeal.

NOTES:

[1]11 U.S.C.A. § 363; 11 U.S.C.A. § 1107.

[2]Jacob A. Kling, Rethinking 363 Sales, 17 Stanford J. L. Bus. & Fin. 258, 262 (2012) ("Asset sales under section 363 have become an increasingly popular alternative to traditional Chapter 11 reorganizations."); Douglas E. Deutsch & Michael G. Distefano, The Mechanics of a § 363 Sale, Am. Bankr. Inst. J., Feb. 2011, at 48 ("In recent years, debtors have increasingly opted to sell most of their assets pursuant to standalone § 363 sales rather than to reorganize and restructure through the chapter 11 process.").

[3]See 11 U.S.C.A. § 363(m); In re WestPoint Stevens, Inc., 600 F.3d 231, 247, 52 Bankr. Ct. Dec. (CRR) 265, Bankr. L. Rep. (CCH) P 81718 (2d Cir. 2010); In re Rare Earth Minerals, 445 F.3d 359, 363, 46 Bankr. Ct. Dec. (CRR) 101, Bankr. L. Rep. (CCH) P 80501 (4th Cir. 2006).

[4]Miami Center Ltd. Partnership v. Bank of New York, 838 F.2d 1547, 1553, 18 Collier Bankr. Cas. 2d (MB) 887, Bankr. L. Rep. (CCH) P 72254 (11th Cir. 1988) ("Section 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation.").

[5]Pub. L. No. 95-598, 92 Stat. 2685 (1978).

[6]11 U.S.C.A. § 363(m).

[7]See, e.g., Westpoint Stevens, 600 F.3d at 247; Rare Earth, 445 F.3d at 363; Weingarten Nostat, Inc. v. Service Merchandise Co., Inc., 396 F.3d 737, 742, 44 Bankr. Ct. Dec. (CRR) 45, Bankr. L. Rep. (CCH) P 80227, 2005 FED App. 0038P (6th Cir. 2005); Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc., 141 F.3d 490, 497, 32 Bankr. Ct. Dec. (CRR) 544 (3d Cir. 1998).

[8]See 11 U.S.C.A. § 364(e); Krebs, 141 F.3d at 499. Section 364(e) provides:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C.A. § 364(e).

[9]See infra section IV(A)(ii).

[10]Westpoint Stevens, 600 F.3d at 248; Rare Earth, 445 F.3d at 363; In re Stadium Management Corp., 895 F.2d 845, 847, 20 Bankr. Ct. Dec. (CRR) 341, Bankr. L. Rep. (CCH) P 73229 (1st Cir. 1990).

[11]In re Gucci, 126 F.3d 380, 387, 31 Bankr. Ct. Dec. (CRR) 893, Bankr. L. Rep. (CCH)

P 77537 (2d Cir. 1997).

[12]See Rare Earth, 445 F.3d at 363. See also Cinicola v. Scharffenberger, 248 F.3d 110, 17 I.E.R. Cas. (BNA) 1089, Bankr. L. Rep. (CCH) P 78396 (3d Cir. 2001) ("[Section 363(m)'s] blunt finality is harsh but it certainly attracts investors and helps effectuate debtor rehabilitation.").

[13]In re Trism, Inc., 328 F.3d 1003, 1006, 41 Bankr. Ct. Dec. (CRR) 78, Bankr. L. Rep. (CCH) P 78848 (8th Cir. 2003).

[14]In re Energytec, Inc., 739 F.3d 215, 219, 58 Bankr. Ct. Dec. (CRR) 252, 70 Collier Bankr. Cas. 2d (MB) 1657 (5th Cir. 2013); Rare Earth, 445 F.3d at 363.

[15]George W. Kuney, Slipping into Mootness, Norton An. Survey Bankr. L. 267, 273 (2007).

[16]George W. Kuney, Slipping into Mootness, Norton An. Survey Bankr. L. 267, 273 (2007).

[17]Alla Raykin, Section 363 Sales: Mooting Due Process?, 29 Emory Bankr. Dev. J. 91, 133–34 (2012).

[18]Alla Raykin, Section 363 Sales: Mooting Due Process?, 29 Emory Bankr. Dev. J. 91, 121 (2012).

[19]Stadium Mgmt., 895 F.2d at 848 ("Both of these policies have existed in bankruptcy law long before the most recent code and are based in the caselaw as well as the statute.").

[20]Stadium Mgmt., 895 F.2d at 848. See also In re Polaroid Corp., 611 F.3d 438, 440, 53 Bankr. Ct. Dec. (CRR) 103, Bankr. L. Rep. (CCH) P 81810 (8th Cir. 2010); Trism, 328 F.3d at 1006.

[21]Gucci, 126 F.3d at 387 ("We have long recognized the value of finality in judicial sales.").

[22]In re Burr Mfg. & Supply Co., 217 F. 16, 21 (C.C.A. 2d Cir. 1914) ("[T]he rule so firmly established as to be no longer debatable.").

[23]See infra section IV(A)(i).

[24]See, e.g., Suter v. Goedert, 504 F.3d 982, 986, 48 Bankr. Ct. Dec. (CRR) 256 (9th Cir. 2007).

[25]See, e.g., Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1424, 13 Collier Bankr. Cas. 2d (MB) 50, Bankr. L. Rep. (CCH) P 70525 (9th Cir. 1985).

[26]See Algeran, 759 F.2d at 1424 ("The rule that failure to obtain a stay pending appeal renders the issue moot did not originate in the Bankruptcy Rules. Rather, it is a judicial doctrine which developed from the general rule that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot, and the particular need for finality in orders regarding stays in bankruptcy.").

[27]See In Matter of Abingdon Realty Corp., 530 F.2d 588, 590 (4th Cir. 1976) ("The Advisory Committee's Note states that the sentence proposed to be added 'is declaratory of existing case law'. We agree."); In re Vista Del Mar Associates, Inc., 181 B.R. 422, 424, 27 Bankr. Ct. Dec. (CRR) 300, 33 Collier Bankr. Cas. 2d (MB) 1315, Bankr. L. Rep. (CCH) P 76533 (B.A.P. 9th Cir. 1995) ("When the Code was enacted this mootness rule was incorporated into [s]ection 363(m) . . ..").

[28]Pub. L. No.95-598, 92 Stat. 2685 (1978); Algeran, 759 F.2d at 1423–24 ("[T]he mootness rule was incorporated in [s]ection 363(m) . . .. the 1976 [Rule 805] amendment did not in its entirety survive the Code revision.").

[29]See In re 255 Park Plaza Associates Ltd. Partnership, 100 F.3d 1214, 1217, 29 Bankr. Ct. Dec. (CRR) 1299, 1996 FED App. 0364P (6th Cir. 1996) ("We thus conclude along with our sister circuits that bankruptcy's mootness rule applies whenever a party in a bankruptcy

proceeding fails to obtain a stay from an order permitting the sale of a debtor's assets and is not limited to conveyances by trustees."); Algeran, 759 F.2d at 1424 ("In the revision of the Bankruptcy Code and Rules, former Rule 805 was fragmented, and the mootness rule was incorporated into [s]ection 363(m), which deals only with conveyances by trustees."); Miami Ctr. Ltd. P'ship, 838 F.2d at 1553 ("The mootness standard is preserved in the present bankruptcy code at 11 U.S.C. § 363(m), but this provision applies only to the sale of the debtor's property by the trustee pursuant to § 363(b) or (c) . . . The Eleventh Circuit, like other circuits, has recognized the continuing viability and applicability of the mootness standard in situations other than transfers by a trustee under § 363(b) or (c).").

[30]The Senate and House of Representatives reports concerning the Bankruptcy Reform Act contain the following identical statement with respect to the provision eventually enacted as section 363(m): "Subsection (1) protects good faith purchasers of property sold under this section from a reversal on appeal of the sale authorization, unless the authorization for the sale and the sale itself were stayed pending appeal. The purchaser's knowledge of the appeal is irrelevant to the issue of good faith." See S. REP 95-595 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5843; H.R. REP. 95-595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6302.

[31]Algeran, 759 F.2d at 1423.

[32]Algeran, 759 F.2d at 1423.; Vista Del Mar, 181 B.R. at 424 ("Fed. R. Bankr. P. 8005, which went into effect in 1983 and superseded Rule 805, did not contain similar language regarding mootness.").

[33]See In re 255 Park Plaza Associates Ltd. Partnership, 100 F.3d 1214, 29 Bankr. Ct. Dec. (CRR) 1299, 1996 FED App. 0364P (6th Cir. 1996); Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 13 Collier Bankr. Cas. 2d (MB) 50, Bankr. L. Rep. (CCH) P 70525 (9th Cir. 1985); Miami Center Ltd. Partnership v. Bank of New York, 838 F.2d 1547, 18 Collier Bankr. Cas. 2d (MB) 887, Bankr. L. Rep. (CCH) P 72254 (11th Cir. 1988).

[34]Westpoint Stevens, 600 F.3d at 247; Weingarten Nostat, 396 F. 3d at 742.

[35]Cinicola, 248 F.3d at 118.

[36]Cinicola, 248 F.3d at 118.

[37]Cinicola, 248 F.3d at 118.

[38]Cinicola, 248 F.3d at 118.

[39]In re PWS Holding Corp., 228 F.3d 224, 236, 36 Bankr. Ct. Dec. (CRR) 955, 44 Collier Bankr. Cas. 2d (MB) 1647 (3d Cir. 2000).

[40]See, e.g., Nil Ghosh, Plan Accordingly: The Third Circuit Delivers A Knockout Punch With Equitable Mootness in Confirmed Chapter 11 Reorganizations in In Re Philadelphia Newspapers, LLC, 23 NORTON J. BANKR. L. & PRAC. 3 (2014) ("Without any direction from the Supreme Court, courts across jurisdictions have not achieved uniformity in the realm of equitable mootness.").

[41]In re C.W. Mining Co., 641 F.3d 1235, 1239–40, 54 Bankr. Ct. Dec. (CRR) 156, 65 Collier Bankr. Cas. 2d (MB) 685 (10th Cir. 2011) [hereinafter C.W. Mining I].

[42]See, e.g., In re Rickel Home Centers, Inc., 209 F.3d 291, 304 n.14, 35 Bankr. Ct. Dec. (CRR) 277, 43 Collier Bankr. Cas. 2d (MB) 1723 (3d Cir. 2000) ("[W]e do not base our holding on [equitable mootness] which has been used most frequently in cases where the reorganization has been substantially consummated.").

[43]See, e.g., Mac Panel Co. v. Virginia Panel Corp., 283 F.3d 622, 625, 39 Bankr. Ct. Dec. (CRR) 51, 48 Collier Bankr. Cas. 2d (MB) 82 (4th Cir. 2002) (considering four factors); In re GWI PCS 1 Inc., 230 F.3d 788, 800, 36 Bankr. Ct. Dec. (CRR) 239 (5th Cir. 2000) (considering three factors); In re Continental Airlines, 91 F.3d 553, 558, 29 Bankr. Ct. Dec. (CRR) 629, 36 Collier Bankr. Cas. 2d (MB) 785 (3d Cir. 1996) (considering five factors).

[44]See, e.g., Westpoint Stevens, 600 F.3d at 253–54 ("Because we conclude that the ap-

peal of the Sale Order is moot pursuant to 11 U.S.C. § 363(m), we need not consider Aretex's alternative argument on the applicability of equitable mootness."); Rickel, 209 F.3d at 304 n.14 ("[W]e need not consider whether equitable mootness could also be relied on as the basis for our holding.").

[45]Fed. R. Bankr. P. 6004(h).

[46]Fed. R. Bankr. P. 8002(a)(1).

[47]Raykin, Section 363 Sales: Mooting Due Process?, 29 Emory Bankr. Dev. J. 91, 104 (2012).

[48]Raykin, Section 363 Sales: Mooting Due Process?, 29 Emory Bankr. Dev. J. 91, 107 (2012).

[49]Fed. R. Bankr. P. 8005.

[50]Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1190–91, 28 Fed. R. Serv. 2d 213 (5th Cir. 1979).

[51]See Fed. R. Bankr. P. 8005 ("A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance.").

[52]See Raykin, Section 363 Sales: Mooting Due Process?, 29 Emory Bankr. Dev. J. 91, 104 (2012).

[53]Raykin, Section 363 Sales: Mooting Due Process?, 29 Emory Bankr. Dev. J. 91, 105 n. 107 (2012) (citing Poplar Grove, 600 F.2d at 1191).

[54]In re Tribune Co., 477 B.R. 465, 482 (Bankr. D. Del. 2012).

[55]See, e.g., In re Lang, 414 F.3d 1191, 1201 (10th Cir. 2005); Matter of Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300, 31 Bankr. Ct. Dec. (CRR) 3, 38 Collier Bankr. Cas. 2d (MB) 137, Bankr. L. Rep. (CCH) P 77412, 27 Envtl. L. Rep. 21081 (7th Cir. 1997). See also Raykin, Section 363 Sales: Mooting Due Process?, 29 Emory Bankr. Dev. J. 91, 104, 105 (2012).

[56]Raykin, Section 363 Sales: Mooting Due Process?, 29 Emory Bankr. Dev. J. 91, 104, 121 (2012).

[57]Fed. R. Civ. P. 60.

[58]Fed. R. Civ. P. 60.

[59]See infra section 4(C).

[60]11 U.S.C.A. § 363(b), (c).

[61]11 U.S.C.A. § 363(f).

[62]Polaroid, 611 F.3d at 440.

[63]Polaroid, 611 F.3d at 439–40.

[64]Polaroid, 611 F.3d at 440.

[65]Polaroid, 611 F.3d at 440.

[66]In re PW, LLC, 391 B.R. 25, 32, 50 Bankr. Ct. Dec. (CRR) 70 (B.A.P. 9th Cir. 2008).

[67]In re PW, LLC, 391 B.R. 25, 32, 50 Bankr. Ct. Dec. (CRR) 70 (B.A.P. 9th Cir. 2008).

[68]In re PW, LLC, 391 B.R. 25, 32, 50 Bankr. Ct. Dec. (CRR) 70 (B.A.P. 9th Cir. 2008).

[69]In re PW, LLC, 391 B.R. 25, 35–36, 50 Bankr. Ct. Dec. (CRR) 70 (B.A.P. 9th Cir. 2008).

[70]In re PW, LLC, 391 B.R. 25, 35–36, 50 Bankr. Ct. Dec. (CRR) 70 (B.A.P. 9th Cir. 2008).

[71]In re PW, LLC, 391 B.R. 25, 36, 50 Bankr. Ct. Dec. (CRR) 70 (B.A.P. 9th Cir. 2008).

[72]Clear Channel, 391 B.R. at 36. Prior to ruling that the appeal was not statutorily moot, the court determined that the appeal was not equitably moot because "reversing the lien stripping raises neither the issue of complexity nor the issue of negative impact on third parties." Clear Channel, 391 B.R. at 34.

[73]Clear Channel, 391 B.R. at 37.

[74]See, e.g., In re Nashville Senior Living, LLC, 407 B.R. 222, 231, 51 Bankr. Ct. Dec. (CRR) 212, Bankr. L. Rep. (CCH) P 81511 (B.A.P. 6th Cir. 2009), judgment aff'd, 620 F.3d 584, 53 Bankr. Ct. Dec. (CRR) 166, 64 Collier Bankr. Cas. 2d (MB) 515, Bankr. L. Rep. (CCH) P 81843 (6th Cir. 2010); In re Namco Capital Group, Inc., 65 Collier Bankr. Cas. 2d (MB) 1437, 2011 WL 2312090 (C.D. Cal. 2011); In re Thorpe Insulation Co., 2011 WL 1378537 (C.D. Cal. 2011).

[75]See, e.g., Richard J. Corbi, Section 363(f) "Free and Clear" Sales May Not Survive Appeal, 18 Norton J. of Bankr. Law & Pract. 163 (2009); Joel H. Levitin et al., Ninth Circuit BAP Dresses Down Lienstripping, Am. Bankr. Inst. J., Oct. 2008, at 52.

[76]Nashville Sr. Living, 407 B.R. at 231.

[77]See 11 U.S.C.A. § 363(h).

[78]In re Nashville Sr. Living, LLC, 620 F.3d 584, 587, 53 Bankr. Ct. Dec. (CRR) 166, 64 Collier Bankr. Cas. 2d (MB) 515, Bankr. L. Rep. (CCH) P 81843 (6th Cir. 2010).

[79]Nashville Sr. Living, 620 F.3d at 592.

[80]Nashville Sr. Living, 620 F.3d at 592.

[81]11 U.S.C.A. § 365.

[82]Krebs, 141 F.3d at 499.

[83]Krebs, 141 F.3d at 498.

[84]Krebs, 141 F.3d at 493.

[85]Krebs, 141 F.3d at 498.

[86]Krebs, 141 F.3d at 497.

[87]Krebs, 141 F.3d at 498.

[88]Weingarten Nostat, 396 F.3d at 743–44; Rickel, 209 F.3d at 303–04; In re Adamson Co. Inc., 159 F.3d 896, 898, 33 Bankr. Ct. Dec. (CRR) 484, Bankr. L. Rep. (CCH) P 77858, Bankr. L. Rep. (CCH) P 77870 (4th Cir. 1998). See also Stadium Mgmt., 895 F.2d at 846.

[89]Cinicola, 248 F.3d at 118.

[90]In re Charter Behavioral Health Systems, LLC, 45 Fed. Appx. 150, 151 (3d Cir. 2002).

[91]In re AFY, 734 F.3d 810, 817, 58 Bankr. Ct. Dec. (CRR) 166, 70 Collier Bankr. Cas. 2d (MB) 605 (8th Cir. 2013), cert. denied, 134 S. Ct. 2315, 189 L. Ed. 2d 177 (2014).

[92]The courts following the per se rule do not use the term to describe the approach as such. Rather, this term was created by those courts that do not follow it. See, e.g., In re Parker, 499 F.3d 616, 621, Bankr. L. Rep. (CCH) P 81003 (6th Cir. 2007); Rickel, 209 F.3d at 298; Krebs, 141 F.3d at 499. Similarly, the term "validity exception" was created by this author for simplicity and is not used by the courts following this type of analysis.

[93]Nashville Sr. Living, 620 F.3d at 593 n.3 ("This court has not yet committed to following one or the other of these two approaches."); Parker, 499 F.3d at 621 ("Our Circuit has yet to decide whether to adopt the *per se* rule preferred by the majority of sister circuits. Because the result in the instant case will be the same under either formulation, we again decline to adopt one controlling approach.") (italics in original); Weingarten Nostat, 396 F.3d at 741 n.3 ("It is unnecessary at this time to decide whether to follow the majority of circuits and adopt a

per se rule . . ..").

[94]See, e.g., Parker, 499 F.3d at 621 ("A majority of our sister circuits construe § 363(m) as creating a *per se* rule automatically mooting appeals for failure to obtain a stay of the sale at issue") (italics in original); *Krebs*, 141 F.3d at 499 ("One construction, followed by a majority of courts of appeals, is a *per se* rule, mooting appeals absent a stay of the sale or lease at issue.") (italics in original).

[95]See Stadium Mgmt., 895 F.2d at 847 ("Absent a stay, the court must dismiss a pending appeal as moot because the court has no remedy that it can fashion even if it would have determined the issues differently."); Westpoint Stevens, 600 F.3d at 247 ("We have held in no ambiguous terms that section 363(m) is a limit on our jurisdiction and that, absent an entry of a stay of the Sale Order, we only retain authority to review challenges to the 'good faith' aspect of the sale"); Willemain v. Kivitz, 764 F.2d 1019, 1023, 13 Bankr. Ct. Dec. (CRR) 415, 12 Collier Bankr. Cas. 2d (MB) 1387, Bankr. L. Rep. (CCH) P 70602 (4th Cir. 1985) ("Willemain's appeal is moot because Willemain failed to secure a stay of the approved sale pending appeal and because that interest was sold to a good faith purchaser."); Matter of Gilchrist, 891 F.2d 559, 560, 19 Bankr. Ct. Dec. (CRR) 1887, Bankr. L. Rep. (CCH) P 73198 (5th Cir. 1990) ("Section 363(m) patently protects, from later modification on appeal, an authorized sale where the purchaser acted in good faith and the sale was not stayed pending appeal."); In re Sax, 796 F.2d 994, 997, Bankr. L. Rep. (CCH) P 71258 (7th Cir. 1986) ("We hold this appeal moot because the sale of the Yacht was authorized under § 363(b) and Three Rivers failed to obtain a stay of the sale."); In re Onouli-Kona Land Co., 846 F.2d 1170, 1171, 17 Bankr. Ct. Dec. (CRR) 1371, 18 Collier Bankr. Cas. 2d (MB) 1436, Bankr. L. Rep. (CCH) P 72247 (9th Cir. 1988) ("Bankruptcy's mootness rule applies when an appellant has failed to obtain a stay from an order that permits a sale of a debtor's assets."); In re The Charter Co., 829 F.2d 1054, 1056, Bankr. L. Rep. (CCH) P 72017 (11th Cir. 1987) ("Because [section 363(m)] prevents an appellate court from granting effective relief if a sale is not stayed, the failure to obtain a stay renders the appeal moot."); In re Magwood, 785 F.2d 1077, 1080, 14 Bankr. Ct. Dec. (CRR) 408, 14 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) P 71030 (D.C. Cir. 1986) ("Under section 363(m) of the Bankruptcy Code, a sale made to a good faith purchaser pursuant to section 363(b) or (c) of the Code—as is the case here—cannot be overturned on appeal unless the sale was stayed pending appeal . . ..").

[96]See In re Stadium Management Corp., 895 F.2d 845, 20 Bankr. Ct. Dec. (CRR) 341, Bankr. L. Rep. (CCH) P 73229 (1st Cir. 1990); In re WestPoint Stevens, Inc., 600 F.3d 231, 247, 52 Bankr. Ct. Dec. (CRR) 265, Bankr. L. Rep. (CCH) P 81718 (2d Cir. 2010); Willemain v. Kivitz, 764 F.2d 1019, 13 Bankr. Ct. Dec. (CRR) 415, 12 Collier Bankr. Cas. 2d (MB) 1387, Bankr. L. Rep. (CCH) P 70602 (4th Cir. 1985); Matter of Gilchrist, 891 F.2d 559, 19 Bankr. Ct. Dec. (CRR) 1887, Bankr. L. Rep. (CCH) P 73198 (5th Cir. 1990); In re Sax, 796 F.2d 994, Bankr. L. Rep. (CCH) P 71258 (7th Cir. 1986); In re Onouli-Kona Land Co., 846 F.2d 1170, 17 Bankr. Ct. Dec. (CRR) 1371, 18 Collier Bankr. Cas. 2d (MB) 1436, Bankr. L. Rep. (CCH) P 72247 (9th Cir. 1988); In re The Charter Co., 829 F.2d 1054, Bankr. L. Rep. (CCH) P 72017 (11th Cir. 1987); In re Magwood, 785 F.2d 1077, 14 Bankr. Ct. Dec. (CRR) 408, 14 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) P 71030 (D.C. Cir. 1986).

[97]See, e.g., Westpoint Stevens, 600 F.3d at 247 (noting jurisdictional bar); Stadium Mgmt., 895 F.2d at 848 (1st Cir. 1990) (same).

[98]See supra section II(A).

[99]See, e.g., Rare Earth, 445 F.3d at 363; Sax, 796 F.2d at 997 n.5 ("[I]t matters not whether the authorization was correct or incorrect. The point is that proper procedures must be followed to challenge a bankruptcy sale authorized under § 363(b)."); Stadium Mgmt., 895 F.2d at 847 ("Section 363(m) does not say that the sale must be proper under § 363(b); it says that the sale must be authorized under § 363(b). There is no doubt that when the bankruptcy court authorized the sale and ordered the [the property] turned over to the purchaser, it was acting under § 363(b). At this juncture, it matters not whether the authorization was correct or incorrect."); Sax, 796 F.2d at 998 ("it matters not whether the authorization was correct or

incorrect. The point is that the proper procedures must be followed to challenge an authorization under § 363(b).").

[100]See, e.g., Westpoint Stevens, 600 F.3d at 247 ("[W]e only retain authority to review challenges to the 'good faith' aspect of the sale"); Gucci, 126 F.3d at 387 ("Because the sale was not stayed § 363(m) permits us to only consider the issue of good faith.").

[101]See, e.g., In re Ginther Trusts, 238 F.3d 686, 688, 37 Bankr. Ct. Dec. (CRR) 94 (5th Cir. 2001) ("As Redstone's status as a good faith purchaser was not challenged in the bankruptcy court, however, we need not address this issue."); Gilchrist, 891 F.2d at 561 ("[The appellant] he raised the [good faith] issue for the first time in his appeal to the district court, but that court refused to consider an argument that was not raised at the appropriate stage in the proceeding. The district court was correct, and we do likewise.").

[102]See infra section V.

[103]Westpoint Stevens, 600 F.3d at 247.

[104]In re Onouli-Kona Land Co., 846 F.2d 1170, 1173, 17 Bankr. Ct. Dec. (CRR) 1371, 18 Collier Bankr. Cas. 2d (MB) 1436, Bankr. L. Rep. (CCH) P 72247 (9th Cir. 1988). The court ultimately determined that the exception did not apply to the case because Hawaii state law did not create a statutory right of redemption. In re Onouli-Kona, 846 F.2d at 1173. The court may have left open the possibility of an expansion of this exception where state law creates a substantive right that could be pursued in state court. See In re Onouli-Kona, 846 F.2d at 1173. ("If such rights would survive the sale of property in state court, they should survive the sale in bankruptcy as well, regardless of whether an appellant failed to comply with the bankruptcy procedure requiring a stay of the sale itself.").

[105]Matter of Lloyd, 37 F.3d 271, 273, 31 Collier Bankr. Cas. 2d (MB) 1786, Bankr. L. Rep. (CCH) P 76125 (7th Cir. 1994). See also In re River West Plaza-Chicago, LLC, 664 F.3d 668, 673 n.1, 55 Bankr. Ct. Dec. (CRR) 246, 66 Collier Bankr. Cas. 2d (MB) 1876, Bankr. L. Rep. (CCH) P 82133 (7th Cir. 2011) ("The narrow exception to this rule that we have previously recognized occurs where, unlike here, the proceeds from the sale of partially exempt property have not yet been distributed to creditors and an exemption attaches to the sale proceeds.").

[106]Trism, 328 F.3d at 1006; Krebs, 141 F.3d at 499.

[107]See supra section III(C).

[108]Krebs, 141 F.3d at 499.

[109]In re Swedeland Development Group, Inc., 16 F.3d 552, 25 Bankr. Ct. Dec. (CRR) 486, 30 Collier Bankr. Cas. 2d (MB) 1034, Bankr. L. Rep. (CCH) P 75803 (3d Cir. 1994) (en banc). Prior to Krebs, the court in Pittsburgh Food & Bev., Inc. v. Ranallo, considered the section 364(e) analysis in Swedeland, but declined to conclusively adopt the position until Krebs. See Pittsburgh Food & Beverage, Inc. v. Ranallo, 112 F.3d 645, 649, 30 Bankr. Ct. Dec. (CRR) 969, Bankr. L. Rep. (CCH) P 77407 (3d Cir. 1997).

[110]Krebs, 141 F.3d at 499.

[111]Polaroid, 611 F.3d at 440–41.

[112]See In re C.W. Min. Co., 740 F.3d 548, 555, 58 Bankr. Ct. Dec. (CRR) 275 (10th Cir. 2014), cert. denied, 134 S. Ct. 2826 (2014) and cert. denied, 134 S. Ct. 2826 (2014) ("[T]he appellants must at least identify an available remedy that will not affect the sale's validity.") [hereinafter C.W. Mining II]; In re Simon Transp. Services, Inc., 138 Fed. Appx. 52, 57, 44 Bankr. Ct. Dec. (CRR) 223 (10th Cir. 2005) ("When it is possible to grant some other type of effective relief that does not affect the validity of the sale, however, an appeal is not moot."), overruled on other grounds by C.W. Mining II, 740 F.3d at 559–60.

[113]See In re Flynn, 417 Fed. Appx. 188, 191 (3d Cir. 2011) (dismissing appeal on the grounds that the appellant's attempt to void the sale would affect the validity of the sale); Short v. Short, 96 Fed. Appx. 846, 847 (3d Cir. 2004) (dismissing appeal that sought to set

aside the sale of real property); Charter Behav. Health, 45 Fed. Appx. at 151–52 (dismissing appeal of the order authorizing the assumption and assignment of certain agreements free and clear of successor liability); Rickel, 209 F.3d at 307 (dismissing appeal on the grounds that reversal or modification would affect the validity of the assignment); Krebs, 141 F.3d at 499–500 (dismissing appeal on grounds that relief sought would affect the validity of the sale). See also George W. Kuney, Slipping into Mootness, Norton An. Survey Bankr. L. 267, 272 (2007) ("Given the narrowness of the exception, for most practical purposes the Third Circuit should be viewed as having adopted a de facto per se rule.").

[114]See AFY, 734 F.3d at 818 (dismissing appeal because relief sought would affect validity of the sale); Polaroid, 611 F.3d at 441 (dismissing challenge to the "free and clear" provision of the sales order because it "would, in effect, unwind the sale."); Trism, 328 F.3d at 1007 (dismissing appeal of the lease assumption and assignment provision of the sale order because doing so would affect the validity of the sale).

[115]See In re Flynn, 417 Fed. Appx. 188, 191 (3d Cir. 2011) (dismissing appeal on the grounds that the appellant's attempt to void the sale would affect the validity of the sale); Short v. Short, 96 Fed. Appx. 846, 847 (3d Cir. 2004) (dismissing appeal that sought to set aside the sale of real property); Charter Behav. Health, 45 Fed. Appx. at 151–52 (dismissing appeal of the order authorizing the assumption and assignment of certain agreements free and clear of successor liability); Rickel, 209 F.3d at 307 (dismissing appeal on the grounds that reversal or modification would affect the validity of the assignment); Krebs, 141 F.3d at 499–500 (dismissing appeal on grounds that relief sought would affect the validity of the sale). See also George W. Kuney, Slipping into Mootness, Norton An. Survey Bankr. L. 267, 272 (2007) ("Given the narrowness of the exception, for most practical purposes the Third Circuit should be viewed as having adopted a de facto per se rule.").

[116]Cinicola, 248 F.3d at 128 (remanding to the district court to determine whether the relief sought would affect the validity of the transaction).

[117]In re Osborn, 24 F.3d 1199, 1203, 31 Collier Bankr. Cas. 2d (MB) 92, Bankr. L. Rep. (CCH) P 75924 (10th Cir. 1994).

[118]Osborn, 24 F.3d at 1202–03.

[119]Osborn, 24 F.3d at 1204.

[120]Osborn, 24 F.3d at 1204.

[121]Osborn, 24 F.3d at 1203. On remand, the debtors ultimately prevailed on their money judgment claim. In re Osborn, 176 B.R. 941, 949 (Bankr. E.D. Okla. 1994), subsequently aff'd, 83 F.3d 433 (10th Cir. 1996) (unpublished table decision).

[122]In re BCD Corp., 119 F.3d 852, 857, 31 Bankr. Ct. Dec. (CRR) 212 (10th Cir. 1997).

[123]In re BCD Corp., 119 F.3d 852, 857, 31 Bankr. Ct. Dec. (CRR) 212 (10th Cir. 1997). The court noted:

> In this case, at oral argument Golfland's counsel argued unambiguously that Golfland had asserted below an interest in the sale proceeds, while BCD's counsel unambiguously denied this. We need not resolve this dispute, however, because we feel that whether Golfland actually asserted an interest in the proceeds below is not critical to our determination whether the appeal has been mooted . . .. Although we generally will not consider issues on appeal that were not presented to the district court, this rule is not inflexible.

[124]In re Paige, 685 F.3d 1160, 1191, 56 Bankr. Ct. Dec. (CRR) 212, Bankr. L. Rep. (CCH) P 82314 (10th Cir. 2012).

[125]C.W. Mining I, 641 F.3d at 1235.

[126]C.W. Mining I, 641 F.3d at 1236.

[127]C.W. Mining I, 641 F.3d at 1236.

[128]C.W. Mining I, 641 F.3d at 1236.

[129]C.W. Mining I, 641 F.3d at 1236. The trustee also moved to dismiss under equitable mootness grounds. The court held that the record was not developed enough to weigh the equitable mootness factors. C.W. Mining I, 641 F.3d at 1236.

[130]C.W. Mining I, 641 F.3d at 1239.

[131]C.W. Mining I, 641 F.3d at 1239.

[132]C.W. Mining I, 641 F.3d at 1239.

[133]C.W. Mining I, 641 F.3d at 1239.

[134]See C.W. Mining I, 641 F.3d at 1239 (citing Suter, 504 F.3d at 986).

[135]Suter, 504 F.3d at 984.

[136]Suter, 504 F.3d at 986.

[137]Suter, 504 F.3d at 987.

[138]C.W. Mining II, 740 F.3d at 555.

[139]C.W. Mining II, 740 F.3d at 553–54.

[140]C.W. Mining II, 740 F.3d at 554.

[141]C.W. Mining II, 740 F.3d at 553.

[142]C.W. Mining II, 740 F.3d at 554.

[143]C.W. Mining II, 740 F.3d at 554.

[144]C.W. Mining II, 740 F.3d at 555.

[145]C.W. Mining II, 740 F.3d at555.

[146]C.W. Mining II, 740 F.3d at 556.

[147]C.W. Mining II, 740 F.3d at 557, 564.

[148]C.W. Mining II, 740 F.3d. at 559.

[149]Simon Transp., 138 Fed. App'x at 56.

[150]C.W. Mining II, 740 F.3d at 559.

[151]C.W. Mining II, 740 F.3d at 560.

[152]C.W. Mining II, 740 F.3d at 561.

[153]C.W. Mining II, 740 F.3d at 562–63.

[154]C.W. Mining II, 740 F.3d at 561–62.

[155]C.W. Mining II, 740 F.3d at 562.

[156]C.W. Mining II, 740 F.3d at 562.

[157]C.W. Mining II, 740 F.3d at 556.

[158]Stadium Mgmt., 895 F.2d at 849.

[159]Stadium Mgmt., 895 F.2d at 846.

[160]Stadium Mgmt., 895 F.2d at 846.

[161]Stadium Mgmt., 895 F.2d at 846.

[162]Stadium Mgmt., 895 F.2d at 846.

[163]Stadium Mgmt., 895 F.2d at 846–47.

[164]Stadium Mgmt., 895 F.2d at 846.

[165]Stadium Mgmt., 895 F.2d at 848.

[166]Stadium Mgmt., 895 F.2d at 848.

[167]Stadium Mgmt., 895 F.2d at 848–49.

[168]Westpoint Stevens, 600 F.3d at 249.

[169]Polaroid, 611 F.3d at 440; Trism, 328 F.3d at 1007.

[170]Energytec, 739 F.3d at 220 ("This circuit has yet to address issues similar to what are raised here.").

[171]Energytec, 739 F.3d at 218.

[172]Energytec, 739 F.3d at 218.

[173]Energytec, 739 F.3d at 218.

[174]Energytec, 739 F.3d at 218.

[175]Energytec, 739 F.3d at 218.

[176]Energytec, 739 F.3d at 218.

[177]Energytec, 739 F.3d at 221.

[178]Energytec, 739 F.3d at 221.

[179]See supra section III.

[180]Fed. R. Civ. P. 60(b).

[181]See, e.g., Matter of Edwards, 962 F.2d 641, 644, Bankr. L. Rep. (CCH) P 74611, 23 Fed. R. Serv. 3d 246 (7th Cir. 1992).

[182]In re Global Energies, LLC, 763 F.3d 1341, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[183]In re Global Energies, LLC, 763 F.3d 1341, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[184]In re Global Energies, LLC, 763 F.3d 1341, 1346, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[185]In re Global Energies, LLC, 763 F.3d 1341, 1345, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[186]In re Global Energies, LLC, 763 F.3d 1341, 1346, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[187]In re Global Energies, LLC, 763 F.3d 1341, 1346, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[188]In re Global Energies, LLC, 763 F.3d 1341, 1346, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[189]In re Global Energies, LLC, 763 F.3d 1341, 1347, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[190]In re Global Energies, LLC, 763 F.3d 1341, 1348, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[191]In re Global Energies, LLC, 763 F.3d 1341, 1349, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[192]In re Global Energies, LLC, 763 F.3d 1341, 1349, 59 Bankr. Ct. Dec. (CRR) 249 (11th Cir. 2014).

[193]In re Hope 7 Monroe Street Ltd. Partnership, 743 F.3d 867, 873, 59 Bankr. Ct. Dec. (CRR) 44 (D.C. Cir. 2014).

[194]In re Hope 7 Monroe St. Ltd. P'ship, 743 F.3d at 872.

[195]In re Hope 7 Monroe St. Ltd. P'ship, 743 F.3d at 872–73.

[196]Alan Gable Oil Development Co., In re, 978 F.2d 1254 (4th Cir. 1992) (unpublished table decision).

[197]Alan Gable Oil Development Co., In re, 978 F.2d 1254 (4th Cir. 1992).

[198]Alan Gable Oil Development Co., In re, 978 F.2d 1254 (4th Cir. 1992). Despite the inapplicability of section 363(m), the court affirmed the bankruptcy court and district court denials of the Rule 60(b) motion on the ground that the policies favoring finality of judicial sales favored finality for the purchaser.

[199]Edwards, 962 F.2d at 644 ("section 363(m) merely protects the bona fide purchaser during the period—that is, pending appeal—in which he otherwise would have no protection against the rescission of a judicial order approving the sale, and does not address the scope of collateral relief.").

[200]In re Adelphia Communications Corp., 222 Fed. Appx. 7, 8 (2d Cir. 2006).

[201]In re Adelphia Communications Corp., 222 Fed. Appx. 7, 8 (2d Cir. 2006).

[202]In re Adelphia Communications Corp., 222 Fed. Appx. 7, 9 (2d Cir. 2006).

[203]See In re Adelphia Communications Corp., 222 Fed. Appx. 7, 9 (2d Cir. 2006).

[204]See 11 U.S.C.A. § 101.

[205]See, e.g., Paige, 685 F.3d at 1178–79.

[206]In re DBSD North America, Inc., 634 F.3d 79, 104, 65 Collier Bankr. Cas. 2d (MB) 201, Bankr. L. Rep. (CCH) P 81933 (2d Cir. 2011) (affirming the bankruptcy court's designation of votes and finding of bad faith under section 1126(e)).

[207]In re Made in Detroit, Inc., 414 F.3d 576, 581, 44 Bankr. Ct. Dec. (CRR) 257, 54 Collier Bankr. Cas. 2d (MB) 743, Bankr. L. Rep. (CCH) P 80311, 2005 FED App. 0286P (6th Cir. 2005); In re Mark Bell Furniture Warehouse, Inc., 992 F.2d 7, 8, Bankr. L. Rep. (CCH) P 75253 (1st Cir. 1993); Gucci, 126 F.3d at 390 (2d Cir. 1997); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 149, 14 Bankr. Ct. Dec. (CRR) 606, 14 Collier Bankr. Cas. 2d (MB) 811, Bankr. L. Rep. (CCH) P 71136 (3d Cir. 1986); Magwood, 785 F.2d at 1081 n.6; In re Suchy, 786 F.2d 900, 902, 14 Bankr. Ct. Dec. (CRR) 547, Bankr. L. Rep. (CCH) P 71189 (9th Cir. 1985); Willemain, 764 F.2d at 1023; In re Bel Air Associates, Ltd., 706 F.2d 301, 305, 10 Bankr. Ct. Dec. (CRR) 868 (10th Cir. 1983); Matter of Bleaufontaine, Inc., 634 F.2d 1383, 1388, 7 Bankr. Ct. Dec. (CRR) 820 (5th Cir. 1981).; In re Rock Industries Machinery Corp., 572 F.2d 1195, 1197, 44 A.L.R. Fed. 889 (7th Cir. 1978). But see AFY, 734 F.3d at 818 (declining to adopt a particular definition of good faith because the appellant did not establish bad faith of the purchaser).

[208]See, e.g., Made in Detroit, 414 F.3d at 581; Gucci, 126 F.3d at 390; Mark Bell, 992 F.2d at 8; Willemain, 764 F.2d at 1023.

[209]Willemain, 764 F.2d at 1023 (4th Cir. 1985); Bel Air Assocs., 706 F.2d at 305, n.12.

[210]Gucci, 126 F.3d at 387; Abbotts Dairies, 788 F.2d at 149.

[211]See, e.g., Willemain, 764 F.2d at 1024 ("Finally, as the language of section 363(m) reveals, Hampshire's knowledge of the pendency of Willemain's appeal does not deprive Hampshire of good faith purchaser status on the basis of knowledge of adverse claims."); AFY, 734 F.3d at 818 ("Rolling Stone's knowledge at the time of the closing that appellants were appealing the sale order does not affect the applicability of § 363(m)").

[212]In re TMT Procurement Corp., 764 F.3d 512, 522, 59 Bankr. Ct. Dec. (CRR) 267, Bankr. L. Rep. (CCH) P 82696 (5th Cir. 2014) (per curiam).

[213]Abbotts Dairies, 788 F.2d at 149–51 ("[W]e hold that when a bankruptcy court authorizes a sale of assets pursuant to section 363(b)(1), it is required to make a finding with respect to the 'good faith' of the purchaser. Alternatively, such a finding might, in certain very limited circumstances, be made by the district court.").

[214]Abbotts Dairies, 788 F.2d at 149–50.

[215]Abbotts Dairies, 788 F.2d. at 150.

[216]Abbotts Dairies, 788 F.2d. at 150.

[217]Abbotts Dairies, 788 F.2d. at 149–50.

[218]Onouli-Kona, 846 F.2d at 1174 ("Ninth Circuit authority, however, does not make good faith depend on "value" and does not require the bankruptcy court to make an explicit finding of good faith.").

[219]In re Thomas, 287 B.R. 782, 40 Bankr. Ct. Dec. (CRR) 176 (B.A.P. 9th Cir. 2002) ("[F]indings of 'good faith' made at the time of the sale may be premature . . . the Ninth Circuit does not require that a finding of 'good faith' be made at the time of sale and has rejected the Third Circuit's contrary rule.").

[220]See In re Revco D.S., Inc., 901 F.2d 1359, 1366, 20 Bankr. Ct. Dec. (CRR) 716, 22 Collier Bankr. Cas. 2d (MB) 1263, Bankr. L. Rep. (CCH) P 73345 (6th Cir. 1990) ("We, therefore, hold that an implicit finding of 'good faith' in a § 364(e) context is insufficient and that 'good faith' under that section should not be presumed.").

[221]See, e.g., In re Ginther Trusts, 238 F.3d 686, 688, 37 Bankr. Ct. Dec. (CRR) 94 (5th Cir. 2001) ("As Redstone's status as a good faith purchaser was not challenged in the bankruptcy court, however, we need not address this issue."); Gilchrist, 891 F.2d at 561 ("[The appellant] he raised the [good faith] issue for the first time in his appeal to the district court, but that court refused to consider an argument that was not raised at the appropriate stage in the proceeding. The district court was correct, and we do likewise.").

[222]See, e.g., In re South Coast Oil Corp., 566 Fed. Appx. 594, 595 (9th Cir. 2014); In re Bon-Air Partnership, 521 Fed. Appx. 131, 134 (4th Cir. 2013); Flynn, 417 Fed. App'x at 190 (3d Cir. 2011); Polaroid, 611 F.3d at 440 n.2; In re Beach Development LP, 50 Bankr. Ct. Dec. (CRR) 24, 2008 WL 2325647 (5th Cir. 2008); Hower v. Molding Systems Engineering Corp., 445 F.3d 935, 939, 46 Bankr. Ct. Dec. (CRR) 102, Bankr. L. Rep. (CCH) P 80512 (7th Cir. 2006); Made in Detroit, 414 F.3d at 583.

[223]U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746, 76 U.S.P.Q. 430 (1948).

[224]Gucci, 126 F.3d at 390; TMT Procurement Corp., 764 F.3d 520–21.

[225]Gucci, 126 F.3d at 390; Abbotts Dairies, 788 F.2d at 149; Willemain, 764 F.2d at 1023.

[226]Gucci, 126 F.3d at 390.

[227]Gucci, 126 F.3d at 390.

[228]See In re Filtercorp, Inc., 163 F.3d 570, 577, 33 Bankr. Ct. Dec. (CRR) 767, Bankr. L. Rep. (CCH) P 77854, 37 U.C.C. Rep. Serv. 2d 799 (9th Cir. 1998) (affirming bankruptcy court's good faith finding that the purchasers, which included insiders, was not clearly erroneous).

[229]See, e.g., Trism, 328 F.3d at 1008 ("Section 363(m) protects a good faith purchaser and lists no other exceptions or any other qualifications to receive the protection of section 363(m).")

[230]11 U.S.C.A. § 363(n).

[231]Jason Binford, Collusion Confusion: Where Do Courts Draw the Lines in Applying Bankruptcy Code Section 363(n)? 24 Emory Bankr. Dev. J. 41, 56 (2008).

[232]Jason Binford, Collusion Confusion: Where Do Courts Draw the Lines in Applying Bankruptcy Code Section 363(n)? 24 Emory Bankr. Dev. J. 41, 56 (2008). (internal quotation marks omitted).

[233]Although the Fifth Circuit in TMT Procurement Corp. recently denied a lender's good

faith status under sections 363(m) and 364(e), the court's analysis centered on whether the lender had knowledge of adverse claims rather than on the lender's conduct. See In re TMT Procurement Corp., 764 F.3d 512, 59 Bankr. Ct. Dec. (CRR) 267, Bankr. L. Rep. (CCH) P 82696 (5th Cir. 2014).

[234]See Gucci, 126 F.3d at 387 ("[T]he only question before us is whether the buyer, Guccio Gucci, is a good faith purchaser under § 363(m).").

[235]See Gucci, 126 F.3d at 387.

[236]See Gucci, 126 F.3d at 387.

[237]See Gucci, 126 F.3d at 387.

[238]See Gucci, 126 F.3d at 385–87 (detailing sale process including two auctions).

[239]Gucci, 126 F.3d. at 385–87.

[240]Gucci, 126 F.3d. at 385–87.

[241]Gucci, 126 F.3d. at 391.

[242]Gucci, 126 F.3d. at 390–91.

[243]See Gucci, 126 F.3d. at 391–93.

[244]Gucci, 126 F.3d. at 394.