Electronic Discovery and Bankruptcy: A REVIEW OF RECENT CASES

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his article is the third in a series about electronic discovery in bankruptcy. The first article covered the basics of electronic discovery, including history, rules and resources. The second discussed the discoverability of information found on social media sites such as Facebook, YouTube and LinkedIn, and how these sites can be rich sources of evidence for bankruptcy cases. This article will discuss the application of electronic discovery to bankruptcy practice and examine some recent bankruptcy cases where electronic discovery issues were particularly significant. A final article will review current technologies that can assist with electronic discovery before and during litigation, introduce examples where the failure to handle the electronic discovery process properly resulted in sanctions and discuss the lessons that can be learned from these examples.

Introduction

Although requests for evidence in digital form were already being allowed by many courts in the last three decades, the concept of electronic discovery really emerged with the high-profile series of decisions in Zubel v. UBS Warburg and the 2006 revisions to the Federal Rules of Civil Procedure. As information about these decisions and the FRCP circulated through CLE presentations and in the professional literature, attorneys from various areas of law began to grapple with what their responsibilities would be for requesting and overseeing the production and preservation of electronically stored information (ESI). The practice of bankruptcy law was no exception.

Electronic Discovery Applied to Bankruptcy

As stated by Giammarco and Rabinowitz-Mazzeo, “[b]ankruptcy courts are not immune to electronic discovery disputes. Professionals serving clients involved in bankruptcy litigation would be well-advised to understand the legal and practical implications that the preservation, collection, analysis and production of electronically stored information (ESI) has on the discovery process.” The authors described two famous bankruptcy cases that were impacted by issues related to electronic discovery. For example, in *In re Quintus Corp.*, which pre-dated the revisions to the Federal Rules of Civil Procedure, the court awarded the trustee $1.9 million as a sanction for a deliberate violation of the discovery rules. In a case from 2008, the debtor’s law firm had to apologize to the bankruptcy court for a “discovery mishap.” In *In re New Century TRS Holdings, Inc.*, more than 70,000 emails were not provided to the bankruptcy examiner, with the law firm blaming an outside vendor for the problem. One of the important lessons from this case is that a law firm will be required to oversee the client as well as any third-party contractor or vendor; this is also embodied as an ethical duty in Rule 5.3 on the responsibilities regarding non-lawyer assistants of the ABA Model Rules (as adopted by the states). In fact, a draft proposal from the ABA Commission on Ethics 20/20 Revised Proposal recommends changing the title of this rule to Responsibilities Regarding Nonlawyer Assistance, making it clear that the attorney is responsible for the conduct of non-lawyers outside of the firm and which would cover many types of commonly outsourced tasks, including many tasks that are part of an electronic discovery process.

Giammarco and Rabinowitz-Mazzeo note that “[s]ubstantive investigations that occur during the bankruptcy process, such as substantive consolidation, insolvency, insider transactions, actual or constructive fraudulent behavior and the administration of the creditor claim process, could all lead to the recovery of property to or for the benefit of debtor’s estate. ESI can be invaluable in providing support for these investigations.” The authors noted that electronic financial records can be analyzed to identify preferential transfers or insider transactions and to assess potential offsetting defenses such as ordinary course and new value. Some of the important steps in an electronic discovery process are described by the authors, including culling and document review, metadata analysis and deletion analysis. Often these services could and should be provided by a reputable and experienced computer forensics expert or electronic discovery vendor. The importance of selecting a high-quality vendor for these processes cannot be overstated, especially since the expert may be called upon to testify about the approach and methodologies used as well as provide proper documentation of steps taken in the analysis and proof of chain of custody.

In *Beyond the Quill: Managing Electronic Information in Bankruptcy*, Brady, Wisler and Thompson noted that “[g]iven the recent global financial crisis and the upswing in bankruptcy filings, issues related to e-discovery and bankruptcy are likely to take center stage. However, because bankruptcy does not fit the traditional litigation mold, the already-mucky waters of e-discovery may be even more difficult to navigate in a bankruptcy.” The authors provide a number of helpful recommendations for handling electronic discovery issues in a bankruptcy case, including:

- “Don’t wait to understand the e-discovery rules
- Know when and what to preserve (noting the difficulty of pinpointing when the duty to preserve is triggered in a bankruptcy case and the adverse implications of waiting to preserve ESI in avoidance actions)
- Have a preservation plan in place before it is needed
- Spoliation and why it is such a risk (citing the *Quintus Corp.* case, 353 B.R. at 93, where the asset purchaser was sanctioned for intentionally destroying data that went to the heart of the Chapter 11 trustee’s breach of contract action. The asset pur-

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chaser deleted relevant electronic records to free up disk space.)

To the extent that bankruptcy proceedings rely on the Federal Rules of Civil Procedure and the Federal Rules of Evidence, it is important to be aware of the revisions to these rules that address electronic discovery and the proper handling of electronically stored information (ESI). The Federal Rules of Bankruptcy Procedure that are impacted by these revisions include:

**Rule 7002. References to Federal Rules of Civil Procedure**
Whenever a Federal Rule of Civil Procedure applicable to adversary proceedings makes reference to another Federal Rule of Civil Procedure, the reference shall be read as a reference to the Federal Rule of Civil Procedure as modified in this Part VII.

**Rule 7016. Pre-Trial Procedure; Formulating Issues**
Rule 16 F.R.Civ.P. applies in adversary proceedings.

**Rule 7026. General Provisions Governing Discovery**
Rule 26 F.R.Civ.P. applies in adversary proceedings.

**Rule 7033. Interrogatories to Parties**
Rule 33 F.R.Civ.P. applies in adversary proceedings.

**Rule 7034. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes**
Rule 34 F.R.Civ.P. applies in adversary proceedings.

**Rule 7037. Failure to Make Discovery: Sanctions**
Rule 37 F.R.Civ.P. applies in adversary proceedings.

**Rule 9016. Subpoena**
Rule 45 F.R.Civ.P. applies in cases under the Code.

**Review of Recent Cases**
Now that five years have passed since the revisions to the Federal Rules of Civil Procedure, it is worthwhile to review some recent bankruptcy cases where there were significant issues with electronic discovery. Several cases from 2011 present a microcosm of the electronic discovery world, since nearly all of the major facets with electronic discovery are reflected in these cases. It is useful to review the Electronic Discovery Reference Model (EDRM) as a reminder of each of the steps in an electronic discovery process and then to identify the step or steps that went awry in the process for each of these cases.

*Yxience, Inc. v Zyen, LLC (In re Yxience)* is an adversary proceeding in a bankruptcy case. A Chapter 11 plan of reorganization was confirmed in the underlying case, where Yxience is the debtor, the plaintiff is the Liquidation Trustee pursuant to the confirmed plan and the defendants are Zyen, LLC (a Nevada limited liability company), Fertitta Enterprises, Inc. (a Nevada Corporation) and William Bullard (the chief financial officer of Fertitta and a manager of Zyen). In its motion, the plaintiff sought sanctions against the defendants because of their failure to establish a protective discovery hold on documents related to the defendants' business dealing with the debtor, for erasure of documents that were electronically stored, and defendants’ failure to produce available business records with reasonable promptness. Note that this case involves not only failure to identify and preserve relevant ESI and to produce it in a timely manner, but also asserts that there was some sort of spoliation of relevant ESI that was severe enough to warrant sanctions.

A variety of discovery requests and subpoenas were served on the defendants and an IT specialist was brought in. One of the defendants, Bullard, indicated that he was not sure whether any additional documents existed on the computer system or services that were responsive to the second discovery request or subpoenas, because he had deleted emails and documents related to Yxience; he also stated that he was not aware of any litigation hold being put in place. In its motion, the plaintiff requested an order imposing monetary and other sanctions, including attorney's fees and the entry of a partial judgment on certain claims, against Bullard, Fertitta and Zyen for their failure to produce critically important ESI and other documents for nearly nine months after production was due. The plaintiff also sought sanctions on the grounds that Bullard admitted in his deposition that he deleted or otherwise destroyed ESI and hard copy documents that were likely responsive to the second discovery request, he abided by no document retention policy at any time, and was not advised to impose a litigation hold even though litigation regarding a $12 million loan was foreseeable. The plaintiff asserted that the ESI and hard copy documents from the relevant time period were critical to proving its case.

In its opinion, the Bankruptcy Court first analyzed its options for ordering sanctions under Rule 37(a) and Rule 37(d). The court then noted that “[e]ven if the Federal Rules of Civil Procedure do not authorize sanctions against the Defendants in this bankruptcy adversary proceeding, the court still has inherent powers to impose sanctions related to discovery abuses” and discussed several cases from the Ninth Circuit that supported the inherent power of the court to sanction and what the severity of the sanctions could be, depending on the level of culpability of the defendants. The court held that the consequences of the defendants’ discovery misconduct were not sufficiently developed to justify a finding of liability in
this complex matter and the plaintiff indicated that it would not further pursue the issue of document destruction. However, the court did find that the facts justified imposing monetary sanctions because:

- No litigation hold was ever instituted, even after three lawsuits were filed concerning this loan.
- Defendant Bullard admitted that he destroyed documents.
- The defendants offered no explanation for why they failed to check the computer equipment used by Bullard for his business activity, even though the issue was discussed between counsel months before the deposition and then the plaintiff was forced to subpoena a third-party in order to get production from the computer in question.
- In conduct the court described as intentionally dilatory, the defendants failed to make a timely inspection of the computer used by Bullard’s secretary, even though existing emails showed copies to her.

Although the defendants produced many pages of documents in response to plaintiff's discovery requests, the court found that this did not excuse the willful, bad faith conduct, which harmed, delayed and increased the costs of plaintiff's attempts to prosecute this adversary proceeding. Indicating that it would not tolerate this kind of behavior, the court ordered that monetary sanctions be imposed to reimburse plaintiff’s expenses, costs and reasonable attorney's fees pursuant to the court's inherent power to supervise and control pending litigation. The plaintiff was ordered to file a supplemental motion to request specific dollar amounts from the defendants, with an appropriate justification for the requests.

A number of important steps in the electronic discovery process were handled improperly or not at all in In re Fontainebleau Las Vegas Contract Litigation, including identification, review, analysis and production as well as the responsibilities of third-parties and vendors. The controversy in this case began with what the court characterized as a routine discovery request, when the Term Lenders subpoenaed Fontainebleau for documents, including electronically stored documents, relating to the financing for the construction of the Fontainebleau Resort and Casino in Las Vegas. After four months without a responsive production, the Term Lenders filled a motion to compel. The court explained the relationship of Fontainebleau Resorts, LLC (FBR) as the parent of Fontainebleau Las Vegas, LLC, the borrower, as well as the various explanations given for delay in the production of documents in response to the subpoena of the Term Lender. After a lengthy recitation of the conduct of FBR and Fontainebleau during the discovery process, the court noted that during the four-month period between the subpoena and the hearing on the motion to compel, Fontainebleau did not move to quash the subpoena for being overly broad or too burdensome, nor did it seek a protective order to try to limit the scope of the subpoenas. Because of the delay, the court granted the Term Lenders’ motion to compel and ordered the production of non-privileged documents and a privilege log, which Fontainebleau did not comply with.

Fontainebleau hired IKON, a third-party vendor specializing in electronic discovery, to search the email server for relevant documents. IKON was later ordered not to begin a privilege review due to financial concerns, but the delay in production and the reasons for it were not communicated to the court. Approximately six months after the subpoena was issued, neither Fontainebleau nor its electronic discovery vendor had even started the process of reviewing the email server – or any of the servers – for privilege and the server had been returned to Fontainebleau’s local counsel. New deadlines for production were set, which Fontainebleau did not comply with, and with Fontainebleau now contending that it would be too onerous to conduct an adequate privilege review within the time period provided by the court. Instead of taking advantage of some options offered by the court, such as filing a motion to protect inadvertently produced documents or requesting an extension on submitting a privilege log, Fontainebleau engaged in a “document dump”, an overproduction of documents and data, and handed over all three servers to the Term Lenders without conducting any meaningful review for relevancy or responsiveness.

Even though the parties had agreed on search terms for the email server, Fontainebleau produced a 126 gigabyte disk containing 700,000 emails. The privilege log for the data on the server was produced after the court-imposed deadline expired.

The dilemma this situation posed for the court is that Fontainebleau argued that there was no waiver, even though the documents and data had already been produced and even though the presumed privileged information from two of the three servers was already in the possession of the Term Lenders. The Term Lenders were reluctant to begin a meaningful review of the documents and data produced because they did not want to confront potential adverse consequences from reviewing Fontainebleau’s privileged information. In analyzing the dilemma, the court found the most accurate statement of Fontainebleau’s conduct to be that it chose not to review any documents or data on the accounting and document servers, for privilege or otherwise, nor did it identify even one document on the servers it produced which it contended was privileged. In fact, the court noted that it was the Term Lenders who provided information about privileged materials on the servers. The court then discussed the attorney-client privilege and waiver, noting that in determining whether a waiver has occurred, the court applies the well-settled principle that any disclosure which is inconsistent with maintaining the confidential nature of the attorney-client privilege, including voluntary disclosure of privileged information, waives the privilege.

The court held that Fontainebleau’s failure to conduct any meaningful privilege review prior to production resulted in a complete waiver of applicable privilege as well as how it violated the principle that as the volume of documents increase, the effort necessary to avoid inadvertent disclosure must also increase. Moreover, Fontainebleau was reminded that it is not enough to ask the court to assume that privileged material will be found on the server; the party has the burden to explain its objections and provide support. Also, some courts have held that to prevent a waiver, not only must the party asserting privilege resist any attempt to produce the documents, the party must exhaust all options to the fullest possible extent, which Fontainebleau did not do. As stated by the court, “[g]iven the
delay in production, the changing explanations for the delay, the failure to timely file a motion for a protective order, the multi-month stalling of depositions caused by FBR's tardy production, the belated and informal suggestion that the Term Lenders should pay for the privilege review, and the continued failure to establish that the servers in fact contain privileged material which was not previously waived through the sharing of servers by different entities,” it characterized Fontainebleau’s argument against waiver as “too little, too late” and determined that the privilege was waived.36 However, the court provided some limited relief to Fontainebleau by requiring the Term Lenders to provide notification in summary fashion if they encountered facially privileged information on the documents or accounting servers.37 Because a privilege log was prepared for the email server, the court did not find a privilege waiver for the material on the email server, unless such materials could also be found on one of the other servers where there had been a waiver.38 The court also absolved the Term Lender of any sanctions or adverse consequences should it inadvertently omit privileged material from the list or lists they provided to Fontainebleau.39

The waiver of attorney-client privilege has been an important issue in a number of cases involving electronic discovery, especially the extent to which using technology means a greater risk of waiver. A thorough analysis of this issue in a bankruptcy case is provided by In re Royce Homes, LP. As the court noted in its memorandum opinion, this is the first common law privilege to protect confidential communications between clients and their attorneys and “[a]t stake is the disclosure of thousands of emails exchanged between a key decision-maker of a once successful residential home building entity, John Speer, and his attorneys.”40 After an extension recitation of the findings of fact and asserting that the court has jurisdiction over the matter, the court provided a detailed analysis of how the federal common law rules are applied to determine whether the attorney-client privilege shields Speer’s emails from production. First, the court discussed why the federal common law of attorney-client privilege should be used rather than Texas law.41 Next, the court described the purpose and definition of the privilege, noting that not all communications between a client and his or her attorney can be protected and that the party invoking the privilege must have had a reasonable expectation of confidentiality or privilege.42 In order to retain their privileged character, attorney-client privileged communications cannot be waived, either voluntarily or inadvertently.43 The court then discussed why Speer, the party who was invoking the privilege, bears the burden of proving that the privilege applies and why the court must narrowly construe Speer’s assertion of the privilege.44 After this analysis, the court explained its finding that Speer failed to carry his burden of proving that the attorney-client privilege should attach to his emails. In a lengthy discussion, the court described how Speer’s evidence failed to prove that his email messages were confidential communications that were transmitted for the primary purpose of securing legal advice.45 The court then asserted that it was the Trustee, on behalf of the debtor’s estate, who held the privilege to any emails transmitted and received when Speer was acting as a representative of the debtor prior to the petition date.46 Perhaps a more important lesson from the case is the extent to which the attorney-client privilege can be waived through improper or careless use of technology. In this case, the court found that even if it assured that Speer’s emails were otherwise protected by the attorney-client privilege, Speer waived the privilege by using the employer’s email system to communicate with his attorneys.47 The debtor’s electronic communications policy explicitly provided that the debtor had access to employee’s personal communications and also prohibited a number of other uses of the computer, including transmitting confidential communications on the debtor’s server. Therefore, Speer could not have had a reasonable expectation that his personal email communications would remain confidential.

Citing a number of key cases, the court noted that although this is a recent issue, “[m]ost courts addressing the issue of whether an employee destroys any privilege he or she may have in personal communications transmitted on company property base their analysis on the confidentiality of an employee’s communications and the employee’s reasonable expectation of privacy.”48 Finding that Asia Global was almost directly on point with the current dispute, the court adopted its four-factor balancing test to determine whether Speer waived any privilege he may have had in the personal emails messages he transmitted using the debtor’s computer and email servers.49 The following four factors were then applied to the instant case:

- Did the debtor have a policy banning personal or other objectionable use?50
- Did the debtor monitor the use of Speer’s computer or email?51
- Did third parties have a right to access Speer’s computers or emails?52
- Did the debtor notify Speer, or was he aware, of the debtor’s use and monitoring policies?53

The court then described how Speer voluntarily waived the attorney-client privilege because he intentionally gave access to his email to others without qualification and in a way that the court deemed as “wholly inconsistent with an intent that his communications remain confidential.”54 Moreover, the court also found that Speer waived the attorney-client privilege by voluntarily disclosing his emails to the Trustee, because he did not object to the Trustee taking possession of the computer and he did not ask to have emails segregated or destroyed.55 From its extensive analysis, the court determined that Speer had not met his burden of showing that the attorney-client privilege protected his email messages and that he had not waived the privilege. In terms of meeting his burden, the court noted that blanket assertions of the privilege will not be enough, nor will what the court termed an “utterly deficient privilege log.”56 Not only had Speer allowed third parties to have unrestricted access to his email, but he could not have had a reasonable expectation of confidentiality due to the debtor’s electronic communications policy. Such Acceptable Use Policies are in place in most employment settings and generally allow the employer to monitor employee communications without restrictions. Personal use of employer-provided email systems is generally either prohibited or expected to be limited and infrequent.

A recent ABA Formal Opinion addresses the danger of waiving the attorney-client privilege when communicating with a client
through a system that can be accessed by third parties. Common examples include employer-provided email, where the employer has reserved the right to monitor and access email messages under an Acceptable Use Policy, or when family members share email accounts or are otherwise able to access each other’s email accounts. The attorney needs to educate the client about the risks and obtain consent for how the client would like to be communicated with. As stated in the opinion, “[a] lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.”

A final case from 2011 shows that extent to which the bankruptcy court is willing to impose sanctions for failure to meaningfully participate in an electronic discovery process. Sanctions will be discussed in the final article of this series; however, it is worth raising awareness of the risks for sanctions because recent studies suggest that not only are judges more likely to impose sanctions for discovery failures, but that the severity of sanctions is increasing, particularly in cases where the conduct of clients and attorneys is especially egregious. In Harmon v. Lighthouse Capital Funding, Inc. (In re Harmon), the court denied the defendant’s motion for reconsideration, citing Lighthouse’s “unremitting abuse of the discovery process.” In reviewing the history of the case, the court highlighted the following deficiencies that merited an adverse factual finding against Lighthouse:

- Failure to search its internal records for discoverable information
- Failure to produce documents controlled by its attorneys
- Failure to timely produce all relevant documents during discovery
- Failure to produce the Escrow Account bank statements that Lighthouse was ordered and agreed to produce
- Its conduct wasted the plaintiffs’ and the court’s time and resources
- It greatly distorted the facts of the case
- Offered unreasonable and inaccurate justifications for its conduct

After a detailed explanation of the reasons for the sanctions, which consumed most of the opinion, the court provided an analysis of Federal Rules of Civil Procedure 37(b) and 37(c) that provide the court with clear authority to sanction Lighthouse for its conduct.

Conclusions

Even this small set of recent cases illustrates how electronic discovery now permeates the practice of bankruptcy law. Failure to participate meaningfully in an electronic discovery process as well as improper handling of electronically stored information at each step in the process can mean painful sanctions for the client and the attorney. These cases also point to the importance of both the client and the attorney being fully conversant with the kinds of technology that the client is using, the multiple places that electronically stored information can be found and the need to properly preserve and then review this material before producing it to the other party. Moreover, attorneys must be aware of the clear danger of waiver of the attorney-client privilege because of the nature of technology and how often this information might be accessible and even shared with third parties. 

Footnotes:


8. Id. at 3.

9. Id. at 3-4.

10. Brady, K., Wisler, J.C., and Thompson, C. Beyond the Quill: Managing Electronic Discovery in Bankruptcy. 28-S ABLJ 42 (June 2009).

11. Id.


15. Id.

16. Id. at 3.

17. Id. at 4.

18. Id.

19. Id. at 4-6.

20. Id. at 6.

21. Id.

22. Id.
consider whether the lien holder is in a dispute with a third party, the outcome of which could affect the estate. In re Gerwer, 898 F.2d 750, 733 (9th Cir. 1990) (bona fide dispute need not be between the debtor or trustee and lien holder, but rather, if the outcome of dispute over interest will affect value of estate, statutory language is sufficient to embrace interest).

6. It should be noted that there are cases holding that a lien is not an "interest" for purposes of Section 363(f)(5). See In re Camnigo, 276 B.R. 257, 266 (Bankr. N.D. Cal. 2002); Becker Indus., 63 B.R. at 478. However, in view of the broad definition of "interest" in 11 U.S.C. § 101(37) and the use of the phrase "such interest is a lien" in Section 363(f)(3), the case law is trending in the direction of recognizing that a lien is indeed a form of "interest" embraced by Section 363(f)(5). See Clear Channel, 391 B.R. at 41-42.

7. Easements or covenants running with land are examples of "interests" not susceptible to satisfaction with money, and these appear to be what the original drafters of the Bankruptcy Code had in mind when they imposed the "money satisfaction" requirement in Section 363(f)(5). See Alec. P. Ostrow, The Odd Free and Clear Sale, or Clear Channelizing the Spirit of Subsections (3) and (5) of Section 363(f) Norton Ann. Surv. of Bankr. Law 102 n.52-53 (2009).

8. Clear Channel, however, appears to have read Section 363(f)(5) narrowly to apply only in situations where the debtor could have compelled the adverse interest holder to accept less than full money satisfaction, citing as examples: (a) a buy-out arrangement among partners, in which the controlling partnership agreement provides for a valuation procedure that yields something less than market value of the interest being bought out, (b) an action to compel specific performance of a buyout provision in a joint venture agreement, (c) a state statute permitting a partnership to compel the buyout of a withdrawing partner, and (d) actions where money damages are a contractual alternative to specific performance. Clear Channel, 391 B.R. at 43-44. But as noted infra, this narrow interpretation of Section 363(f)(5) has not gained traction even with bankruptcy courts in the Ninth Circuit if measured by published decisions.

9. While more recent cases have tended not to rely on the theory, a fair number of courts have held that a hypothetical Chapter 11 plan "cram-down" scenario constitutes a proceeding in which the lien holder can be compelled to accept less than full satisfaction of its lien. See, e.g., Healthco Inc., 174 B.R. at 176; Terrace Chalet, 159 B.R. at 829; In re Hunt Energy Co., 48 B.R. 472, 485 (Bankr. N.D. Ohio 1985).

10. It should be noted that the argument made in Clear Channel and other cases which rely on the canons of statutory construction (i.e., that an interpretation of one statute that tends to render another provision of the same statute mere surplusage should be avoided), cuts both ways when applied to Sections 363(f)(3) & (5) and is therefore of little real interpretative value. The argument at its roots is based on the concept that statutory provisions must apply to discrete situations. But there is no reason to believe this to be true in the context of Section 363(f). Outside of bankruptcy, a lien holder could refuse to release its lien despite tender of full payment, which would give the debtor the right to bring an action to quiet title or compel the release of the lien. This situation squarely implicates both Section 363(f)(3) and 363(f)(5). Yet it could be argued that 363(f)(5) would appear to be rendered superfluous by the "face value" interpretation of Section 363(f)(3). It is respectfully submitted that neither Clear Channel nor any other opinion taking the same interpretive approach makes a convincing case that Congress, in fact, intended that there not be overlap in the application of the different sub-parts of Section 363(f). Stated differently, given the variety of circumstances presenting themselves in a bankruptcy sale it seems more plausible to infer that Congress intended to permit free and clear sales if one of Section 363(f)'s provisions applied, even if another provision applied as well.
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