TRAVERSING *TRAVERSE*

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In the relatively small world of Chapter 7 bankruptcy trustees and individual bankruptcy lawyers in the northeastern United States, *In re Traverse*[1] is a big deal. It is a big deal for a couple of reasons: first, a significant means by which trustees recover money for creditors has been curtailed; and second, because the reason for that curtailment is hard to fathom. Because the rationale is hard to fathom, it is also hard to predict how far it will extend. This article will suggest that there are three ways to understand *In re: Traverse:* (a) it represents a fundamental determination that an exempt interest in property measured by a monetary value, makes the entire asset not property of the estate[2]; (b) it represents bad law from hard facts[3]; or (c) it represents a limitation of the ability of the trustee to sell under 11 U.S.C. §363(b) but that the analysis under 11 U.S.C. §363(f) has not yet been done. This article will argue that *In re Traverse's* impact may be limited in subsequent cases where the issue is squarely presented under 11 U.S.C. §363(f).

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[1] 753 F.3d 19 (1st Cir.), *cert. denied, sub nom.,DeGiacomo v. Traverse,* 135 S.Ct. 459 (2014).

[2] *See, generally, Schwab v. Reilly*, 560 U.S. 770, 130 S.Ct. 2652, 177 L.Ed.2d 234 (2010)

[3] "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." *N. Sec. Co. v. United States*, 193 U.S. 197, 364, 24 S. Ct. 436, 468, 48 L. Ed. 679 (1904)(Holmes, J. dissenting)

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THE FACTS, PROCEDURAL POSTURE AND OUTCOME BELOW:

On July 5, 2005, Virginia A. Traverse executed a promissory note and mortgage to Washington Mutual Bank (now held by JP Morgan Chase). [4] The promissory note was secured by a mortgage which was not recorded.[5] On August 14, 2011, Ms. Traverse filed her voluntary petition under Chapter 7.[6] The First Circuit opinion indicates that when she filed her schedules and statement of financial affairs, "[s]he listed the remaining claim secured by JP Morgan's mortgage as $185,777.30 and the claim secured by Citibank's mortgage as $29,431.04."[7] Ms. Traverse also "claimed a homestead exemption in the property in the amount of $500,000."[8]

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[4] Proof of Claim No. 4-1; *In Re:Traverse*, Bk. No. 11-17703 (Bankr. D. Mass)
[5] "On July 11, 2005, Traverse executed a mortgage on the home in favor of Washington Mutual Bank to secure a loan of $200,000."
In re Traverse, 753 F.3d 19, 23 (1st Cir.) cert. denied sub nom. DeGiacomo v. Traverse, 135 S. Ct. 459, 190 L. Ed. 2d 332 (2014).
[6] *Id*. The First Circuit does not note it but this was Ms. Traverse's second petition in two years, the first was a failed Chapter 13 petition filed on July 2, 2010, Bk. No. 10-17321 (Bankr. D. Mass.) closed June 7, 2011. She filed the second case within months after the first was closed.
[7] *Id.* Here, the facts reported by the First Circuit do not reflect the record. Ms. Traverse's Schedule A (describing her real property) discloses her residence at 16 Magnolia Avenue, Lynn, Essex County with a value of $223,500 and the amount of secured claims as $29,431 (the second mortgage only). Ms. Traverse's Schedule D (describing her secured debt) shows no secured claim to JP Morgan Chase at all. Ms. Traverse's Schedule F (describing her unsecured indebtedness) shows an amount due to Chase Home Finance of $185,777.30. Doc. Entry 13, *In Re:Traverse*, Bk.no. 11-17703 (Bankr. D. Mass). Her statement of financial affairs and schedules in the earlier Chapter 13 proceeding, likewise recorded the debt to JP Morgan Chase as unsecured. Doc. Entry 19, Bk. No. 10-17321 (Bankr. D. Mass.)
[8] *Id.*

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On December 15, 2011, the trustee filed his complaint to avoid the mortgage as unperfected and "to preserve it for the benefit of the estate."[9] Ms. Traverse countered that while it may be true that the mortgage may be avoided and preserved, that meant only that he could sell the mortgage not the "underlying property."[10]

The Bankruptcy Court granted the relief requested by the Trustee and denied Ms. Traverse's counterclaim. Ms. Traverse appealed making both a *Stern*[11] argument and the argument that the only property that the trustee might sell is the mortgage.[12] The Bankruptcy Appellate Panel spent some time on the analysis of *Stern* and then made short work of the exemption argument: "[The trustee] asserts that he may sell the property, satisfying the liens encumbering it, funding Traverse's exemption in proper order (if proceeds reach that far), and holding any surplus for the estate (if the proceeds reach *that* far). The trustee is correct."[13]

The First Circuit reversed:

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[9] *Id.*

[10] *Id.* The argument made by Ms. Traverse before the bankruptcy court was more precise than the First Circuit reports. The argument made was that the mortgage conveyed legal title subject to defeasance and that Ms. Traverse retained equitable title; that she exempted the equitable title by her schedule C claim of exemption and that therefore the equitable title was not property of the estate upon which the trustee's powers under section 363 could work, and therefore the only property that the trustee could sell was legal title subject to defeasance.

[11] *Stern v. Marshall,* ____ U.S. _____, 131 S. Ct. 2594, 180 L.Ed. 2d 475 (2011). The first cirucuit summarily dispatched the *Stern* argument in a single footnote – foot note 3.

[12] *In Re: Traverse,* 485 B.R. 815 (1st. Cir. B.A.P. 2013) *rev'd*, 753 F.3d 19 (1st Cir. 2014) *cert. denied sub nom. DeGiacomo v. Traverse,* 135 S. Ct. 459, 190 L. Ed. 2d 332 (2014)

[13] Id. at 820

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> We affirm today the principle that the preservation of a lien entitles a bankruptcy estate to the full value of the preserved lien—no more and no less. Where this lien is an undefaulted mortgage on otherwise exempted property, the trustee may for the benefit of the estate enjoy the liquid market value of that mortgage, claim the first proceeds from a voluntary sale, or wait to exercise the rights of a mortgagee in the event of a default. But the trustee may not repurpose the mortgage to transform otherwise exempted assets, to which neither the estate nor the original mortgagee boasted any ownership rights, into the property of the bankruptcy estate.[14]

THE THEORY THAT THE FIRST CIRCUIT MEANS WHAT IT APPEARS TO SAY: THAT THE CLAIM OF EXEMPTION REMOVED "THE PROPERTY" FROM THE ESTATE AND DID NOT MERELY PROTECT A PORTION OF THE PROPERTY WITH A CERTAIN MONETARY VALUE.

The easy way to interpret the First Circuit in *Traverse* is that the First Circuit means that when Ms. Traverse claimed the home as exempt, and after the deadline to object to that claim of exemption, the exemption became effective and the home was no longer property of the estate.[15] The corollary then is that if the home is not property of the estate then 11 U.S.C. §363 (b) does not permit the trustee to sell it.[16]

The problem with that understanding is that the First Circuit seemed to walk up to that analysis but did not adopt it. The problem facing the court was that the Supreme Court, in *Schwab v. Reilly*, made it clear that where an interest in property

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[14] *In re Traverse*, 753 F.3d 19, 31 (1st Cir.) *cert. denied sub nom. DeGiacomo v. Traverse*, 135 S. Ct. 459, 190 L. Ed. 2d 332 (2014) (footnote omitted).
[15] *See, e.g., Taylor v. Freeland & Kronz,* 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992) (Failure to object to facially objectionable claim of exemption bars a later objection); *Schwab v. Reilly,* 560 U.S. 770, 130 S.Ct. 2652, 177 L.Ed. 2d 234 (2013) (Claim of exemption listing a dollar amount within the statutory limits is not facially objectionable so as to require objection within thirty days of the meeting of creditors).
[16] 11 U.S.C. §363(b)(1)§ ("The trustee . . . may sell.. . . property of the estate . . .")

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measured by a certain monetary amount is claimed as exempt, what is exempt "is an interest, the value of which may not exceed a certain dollar amount, in a particular asset, *not* . . . the asset itself."[17] Since the Massachusetts homestead is an exemption of an interest in property measured by a certain monetary amount, the First Circuit could not assert that "the asset itself" was removed from the bankruptcy estate. Instead, the FirstCircuit noted that in *Schwab v. Reilly,* "the asset's value surpassed the exemption amount, creating additional equity for the estate."[18] Then the court noted the words of a Massachusetts bankruptcy court, *In Re: Pierce,* that "where a debtor's homestead exemption equals or surpasses the total value of her property, the bankruptcy court has construed the Massachusetts homestead exemption to protect the debtor's physical ownership of as well as her financial rights in her home."[19] Faced with the Supreme Court's rule, the circuit

[17] *Schwab v. Reilly*, 560 U.S. 770, 780, 130 S. Ct. 2652, 2660, 177 L. Ed. 2d 234 (2010); *see, also, Reeves v. Callaway*, 546 Fed. Appx. 235, 241 (4th Cir. 2013) (Debtor may claim an exempt interest in property fully encumbered by liens but that interest alone is exempt and not the property itself); *In re Orton,* 687 F.3rd 612, 615 (3rd Cir. 2012) (Holding that because the interest alone was exempt and not the asset itself, the trustee was entitled to postpetition appreciation beyond the exempt interest).

[18] *In re Traverse*, 753 F.3d 19, 28 (1st Cir.) *cert. denied sub nom. DeGiacomo v. Traverse*, 135 S. Ct. 459, 190 L. Ed. 2d 332 (2014).

[19] *Id.* The court cited Judge Hillman's opinion in *In re: Pierce,* 483 B.R. 368 (Bankr. D.Mass. 2012). The court did not explain why Judge Hillman's dicta in a very different circumstance was more persuasive on the *Traverse* facts than Judge Hillman's colleague, Judge Hoffman, sitting in the same court as the Trial Judge in the matter under appeal. The court further did not attempt to reconcile its recitation of the Massachusetts practice with the outcome in *Pierce* where Judge Hillman permitted the Trustee's sale over the Debtor's objections. Judge Hillman himself, in *In re: Hannon*, 514 B.R. 69 (Bankr. D.Mass. 2014) permitted a trustee to sell fully encumbered exempted property to satisfy avoided liens saying "[t]he asset is

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court did not adopt a rule inconsistent with either the Supreme Court in *Schwab,* or with what it said was the Massachusetts practice of *Pierce,* but only said "[w]e decline to depart from that practice today."[20]

Instead the First Circuit re-stated the question in terms that go not to exemption but to the scope of sale powers under 11 U.S.C. §363:

> More to the point, neither *Schwab* nor its progeny address the precise legal question before us. The issue raised by this case is not whether Traverse's homestead exemption withdrew her home or merely the right to its proceeds from the property of the estate. The issue is whether a trustee's powers of sale under § 363 justify selling a debtor's asset where no equity remains for the estate beyond the senior claims of secured creditors and the debtor's own exempt interest.[21]

The first way of understanding the *Traverse* opinion does not work because while the court seems to want to argue that homestead exempted under the Massachusetts homestead law is not property of the estate and therefore cannot be sold by the trustee, it stops short of actually making that declaration.

A second reason that impairs the first way of understanding *Traverse* is that the bankruptcy code explicitly does not remove property from the estate by any means except administration or abandonment. "[P]roperty that is not abandoned under [Section 554] and that is not administered in the case remains property of the estate."[22] Property that is "exempt" is not clearly removed from the estate but merely "is not liable during or after the case for any debt of the debtor that arose . . .

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subject to administration by the Chapter 7 trustee, while the debtor retains the right to receive the value of his exemption, if any, from a sale of the property." *Id.*at 77.

[20] *Id.*

[21] *Id.*

[22] 11 U.S.C. § 554(d); *see, also,*Title 11, Capter 3, Subchapter III tited "Administration".

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before the commencement of the case [with certain limited exceptions]."[23] The Bankruptcy Code seems to pretermit any removal of property from the estate without administration or abandonment.[24]

THE THEORY THAT HARD CASES MAKE BAD LAW IS NOT A SUFFICIENT EXPLANATION OF THE *TRAVERSE* DECISION

A second way of understanding *Traverse* is to simply write it off as unsympathetic facts making bad law. The bankruptcy papers reveal Ms. Traverse to be living on a retirement pension.[25] The court noted that "Traverse has kept current on her mortgage payments to both JP Morgan and Citibank."[26] It simply seemed unfair to the First Circuit that this blameless pensioner debtor should face losing her home merely because both Washington Mutual and JP Morgan Chase Bank, had failed in their diligence by omitting to record the mortgage:

> Our holding today comports not only with the most coherent reading we can make of the trustee's powers under the Bankruptcy Code, but also with any sense of fairness on these facts. As noted above, there is no dispute that if Traverse's first mortgage remained with JP Morgan she would retain her home in

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[23] 11 U.S.C. §522(c); *cf*.. 11 U.S.C. 725 (requiring the trustee "before final distribution of property of the estate under section 726" to "dispose of any property in which any entity other than the estate has an interest"); 11 U.S.C. §726(a) (providing the order, on final distribution, of property of the estate and **not** providing for any distribution to the debtor until payment of all creditors and expenses).

[24] The language of the Bankruptcy Code and the language often used to talk about it here are different. Many jurists when talking generally, including Mr. Justice Thomas, have said that "a claimed exemption will exclude the subject property from the estate . . ." *Schwab v. Reilly*, 560 U.S. 770, 775, 130 S. Ct. 2652, 2658, 177 L. Ed. 2d 234 (2010). But that language often seems mostly a shorthand expression meaning that the exempt interest may not be administered for the benefit of certain creditors. 11 U.S.C. § 522(c). That language does not appear to actually consider all of the consequences of exclusion from the estate.

[25] *In Re Traverse,* Bk. No 11-17703, Statement of Financial Affairs, Q. 2, and Schedule I, line 12, Docket Entry no. 13.

[26] *In re Traverse, supra,* 753 F.2d at 23.

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> these exact same circumstances. We see no reason why the trustee's preservation of the mortgage under § 551 should alter that result. The objective behind the trustee's powers of avoidance and preservation is to change the priority of creditors' claims to property falling under a debtor's estate, boosting the standing of unsecured creditors against both illegitimate secured claims and junior secured creditors. *. . .* It remains a mystery to us why a provision clearly aimed at regulating the distribution of a debtor's estate among her creditors should exacerbate the debtor's substantive obligations and vulnerabilities in bankruptcy. That is especially the case here, where the trustee's ability to preserve JP Morgan's mortgage derives exclusively from the failure of two banking corporations to perform due diligence and record their mortgage on Traverse's home. To sanction the sale of the debtor's home in this case would be to punish an individual consumer for the administrative oversights of the banks.[27]

One can read the court's sympathy for a debtor on a pension who was done in by the bad bank. The hard case that makes bad law. There are multiple problems with the "hard case" explanation. The first is that it is not a one-off.[28] It happens quite regularly that sloppy banking practices lead to trustee avoidance actions frequently of houses that are or could be exempt. The second reason that the hard case explanation is unsatisfactory is that it gives insufficient deference to the court. The court attempted to explain the law, it is our job now to understand that explanation. The third reason that the one-off explanation is problematic is that such an explanation is merely avoidance. It does not provide guidance for the future.

THE THEORY THAT *TRAVERSE* IS NOT A CASE ABOUT EXEMPT PROPERTY BUT INSTEAD IS A CASE ABOUT THE LIMITS OF THE TRUSTEE'S POWERS UNDER SECTION 363(b) AND THE COROLLARY THAT SECTION 363(f) SUPPORTS A CONTINUED EFFORT BY TRUSTEES TO SELL.

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[27] *Id.* at 30-31 (footnotes and citations omitted).
[28] "One-off" refer so something singular or unique; "limited to a single time, occasion or instance." www.meriam-webster.com/dictionary/one-off last visited August 20, 2015.

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In *Traverse,* the First Circuit announced a rule that it is only "this equity for unsecured creditors that authorizes a trustee to liquidate the property in the first place . . ."[29] There must be "unsecured equity triggering the trustee's sale powers under §363."[30] The First Circuit cited cases and the US Trustee's Handbook for Chapter 7 trustees each of which enunciate the prudential exhortation that the trustee should not sell merely for the benefit of secured creditors.[31] The First Circuit turns that rule of prudence into a mandate: no sale unless there is equity:

> But he has not changed the status of the lien as a secured lien, to be subtracted from the value of the asset before any remaining equity may be calculated. In this sense, for the very reason that the preserved mortgage entitles the bankruptcy estate to any proceeds from Traverse's property, as a senior secured claim overriding Traverse's claimed homestead exemption, it cannot double as the unsecured equity triggering the trustee's sale powers under § 363.[32]

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[29] *In re Traverse, supra,* 753 F.3d. at 29.
[30] *Id.*
[31] The court cites *In re Scimeca Found., Inc.*, 497 B.R. 753 (Bankr. E.D. Pa. 2013) which approved a sale with a carveout as representing good faith conduct by the trustee: "I do conclude, however, that with this reduction there is sufficient benefit to non-secured creditors to find that the trustee is acting in good faith in proposing to sell this realty for $4 million." *Id at* 782. Where a trustee sale with a partial carveout benefits unsecured creditors and is approved, a trustee sale with a 100% carveout (i.e, because the lien was avoided) would seem to satisfy the same criteria. The court also cited US Trustee Handbook for Chapter 7 Trustees. (the "Handbook"). The Handbook by its terms is not a statement of the law but only "the views of the United States Trustee Program (Program) on the duties owed by a chapter 7 trustee." Handbook, P. 1-1. Those views do not include a categorical denial of a right to sell encumbered property but a more nuanced analysis: "**Generally**, a trustee **should** not sell property subject to a security interest **unless** the sale generates funds for the benefit of unsecured creditors." *Id. p. 4-16*
[32] *In Re: Traverse, supra.* 753 F.3d at 30.

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That rule finds no purchase in § 363(b).[33] Section 363(b) simply authorizes the trustee to "use, sell or lease . . . property of the estate."[34] In fact other bankruptcy code provisions appear to compel the trustee to attempt the sale. The trustee is required to "collect and reduce to money the property of the estate . . . as expeditiously as is compatible with the best interest of the parties in interest."[35] If the property is "burdensome or of inconsequential value and benefit to the estate" then the trustee "may," or, the court "may order the trustee to" abandon that property.[36] The trustee "shall dispose of any property in which an entity other than the estate has an interest."[37] Any property that is not administered or abandoned "remains property of the estate."[38] The confluence of sections 363(b), 704(a)(1), 725 and 554 require the trustee to expeditiously either sell or abandon exempted property and until he or she takes one of those actions, exempt property remains property of the estate. There is no rule in section 363(b) that bars sale unless there is "equity."[39]

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[33] *In re Childers*, 526 B.R. 608, 612 (Bankr. D.S.C. 2015) ("There is no requirement under § 363(b) or § 704(a) that there be equity in property of the estate above any existing liens or interests before the Court can approve a sale.")
[34] 11 U.S.C. §363(b).
[35] 11 U.S.C. §704(a)(1).
[36] 11 U.S.C. §554 (a) &(b).
[37] 11 U.S.C. §725.
[38] 11 U.S.C. §554(d)
[39] *See, e.g., In re Childers*, 526 B.R. 608, 612 (Bankr. D.S.C. 2015) ("There is no requirement under § 363(b) or § 704(a) that there be equity in property of the estate above any existing liens or interests before the Court can approve a sale.")

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There is, however, such a rule in section 363(f).[40] Viewed through the lense of section 363(f) the question is: assuming Ms. Traverse's homestead is an "interest in such property"[41], may the trustee sell the property "free and clear of" that interest. Section 363(f) permits such a sale if, but only if, one of five (5) conditions is met:

> **(1)** applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> **(2)** such entity consents;
> **(3)** such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> **(4)** such interest is in bona fide dispute; or
> **(5)** such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[42]

We do not know the answer to the question: could the sale free of the homestead interest be approved under Section 363 (f)? No request was made, and no record was developed to meet the trustee's burden under section 363(f), instead, the argument was framed under section 363(b):[43] the trustee's position was that "he

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[40] 11 U.S.C. §363(f)
[41] *See, In Re: Whaley*, 353 B.R. 209 (Bankr. E.D. Tenn. 2006) (Non-debtor, non-title holder spouse's homestead interest under Tennessee law is not an interest for purposes of section 363(f) where the proposed sale pays in full the Debtor's homestead exemption); *In re Childers*, 526 B.R. 608 (Bankr. D.S.C. 2015) (Homestead that reaches no equity is not an interest protected by 363(f)); *In re: Ross,* 2015 WL 3781074, fn. 15(Bankr. D.S.C. 2015) (similar)
[42] 11 U.S.C. §363(f)
[43] The issue arose in the debtor's counterclaim to the trustee's complaint to avoid the mortgage, so the ordinary burdens in a motion to sell under §363 were not made explicit. If it had been a motion to sell then "[t]he burden is on the moving party to show that one of the provisions of § 363(f)(1)-(5) is applicable to each lien or interest from which the sale is to be free and clear ." *BAC Home Loans Servicing LP v. Grassi*, No. 08-21085-JBH, 2011 WL 6096509, at *5 (B.A.P. 1st Cir. Nov. 21, 2011) (Internal quotes and citation omitted); *In Re Daufuskie Island Properties, LLC,* 431 B.R. 626, 637 (Bankr. S.D.S.C. 2010) (noting burden is on the sale proponent to

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may dispose of it [the home] like any other property so long as he repays Traverse the value of her exemption from the proceeds."[44] The proceeds were anticipated to be the dollar value of the home. Since the court assumed that the value of the property was about $223,500 and that Ms. Traverse was entitled to up to $500,000 in homestead, the trustee is proposing that she be paid the excess of value over the mortgages, but an amount still less than the total statutory entitlement. The First Circuit would not allow Ms. Traverse to be so short-changed, but, the First Circuit would have allowed the sale if the proposal was to pay Ms. Traverse the full $500,000 homestead.[45]

As a statutory matter, under Section 363(b) the First Circuit was right: the trustee has no power under section 363(b) to sell free of any non-estate interest. But the First Circuit's statement that the trustee could have sold the property if there was equity beyond the homestead creates an analogy to Section 363(f)(3). Analogizing the homestead to a lien, the First Circuit would have allowed the sale free and clear of the homestead, if the sale price was greater than the aggregate face

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identify the basis for the sale) (*cited with approval by Dishi & Sons v. Bay Condos, LLC,* 510 B.R. 696, 711 (S.D.N.Y. 2014)).

[44] *In re Traverse, supra.*, 753 F.3d at 28

[45] "a trustee will typically sell the home only where its value exceeds both the mortgage liens on the property and the debtor's homestead exemption." *In re Traverse*, *supra,* 753 F.3d at 25 (implying that the sale would be satisfactory to the court if the full homestead was paid from the sale); *but see, In re Maisonet,* 2015 WL 1636152 (Bankr. D.P.R. 2015) (Permitting sale where the the debtor had defaulted on the mortgage and where the claimed homestead of $20,975 did not exceed the $160,000 value of the home, even though the value did not exceed *both* the mortgage lien and exemption)..

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value of all such liens but refused to allow it where the sale price was equal to the fair value of the property but less than the face amount of the liens.[46]

If instead, the matter had been analyzed as sale free and clear under Section 363(f) what would have been the outcome? There are five alternative conditions which could have justified a sale free and clear. Three are easily dispensed: the interest holder did not consent and therefore clause (2) does not apply; the interest was not a lien, and therefore clause (3) does not apply;[47] and finally, there is no assertion of a bona fide dispute, and therefore clause (4) does not apply.

Only two clauses of section 363(f) might apply: clause (1) permitting sale free and clear if applicable non-bankruptcy law permits such sale; and clause (5) permitting sale free and clear if Ms. Traverse "could be compelled in a legal or equitable proceeding, to accept a money satisfaction."

SECTION 363(f)(1)MAY NOT AUTHORIZE THE SALE

Section 363(f)(1) authorizes the sale free and clear if "applicable nonbankruptcy law permits sale of such property free and clear of such interest." The analytic difficulty is that the statute does not tell us who might be the hypothetical seller and in what hypothetical circumstance. For example, the first

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[46] *See, by comparison, Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC)*, 391 B.R. 25 (B.A.P. 9th Cir. 2008) (holding that a 363(f)(3) sale may be had only for a price greater than the face value of all liens, not the economic value of such liens); *In Re: Perroncello,* 170 B.R. 189 (Bankr. D. Mass. 1994) (same); *In re: LCC Financial Corp.,* 2002 WL 338994816 (Bankr. D.N.H. 2002) (adopting *Perroncello's* reasoning); *contra, In re: Boston Generating, LLC,* 440 B.R. 302 (Bankr. S.D.N.Y. 2010); *In re Beker Industries, Corp.*, 63 B.R. 474 (Bankr. S.D.N.Y. 1986).

[47] "The term 'lien' means charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37).

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mortgage holder might attempt a sale and such a sale could be free of the homestead interest.[48] What cases exist that analyze that meaning of sub-section (f)(1) generally reject the mortgagee as hypothetical seller and hold that sub-section (f)(1) refers only to interests of which the debtor could sell free and clear.[49]

Since the test is whether the "debtor" could sell free and clear of the interest, over the objection of the holder of the homestead, then one must imagine a situation where someone standing in the shoes of the debtor had acquired the property subject to a homestead held by another. An analogous situation is a non-owner widow holding over after a sale by a mortgagee holding a mortgage from the dead husband. The purchaser at the foreclosure sale stands in the shoes of the dead husband. The statutory test that sub section (f)(1) imposes is whether that mortgagee's purchaser takes free of the non-owner widow's homestead. The answer in Massachusetts is no.[50] Since that mortgagee could not sell free of the homestead, the bankruptcy result probably is that the trustee may not sell free and clear of the homestead under subsection (f)(1).

SUB-SECTION (f)(5) AUTHORIZES THE SALE BUT THE SHOWINGS THAT THE SALE PROPONENT MUST MAKE ARE UNCERTAIN

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[48] Mass. Gen. Laws Ann. ch. 188, § 3 (West) (excluding from the effect of a homestead "a mortgage on the home as provided in sections 8 and 9.")

[49] *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696, 710 (S.D.N.Y. 2014) "[T]he Court holds that paragraph (1) refers not to foreclosure sales, but rather 'only to situations where the owner of the asset may, under nonbankruptcy law, sell an asset free and clear of an interest in such asset.'") *Citing and quoting, In re Jaussi*, 488 B.R. 456, 458 (Bankr.D.Colo.2013).

[50] *Parks v. Reilly*, 87 Mass. 77 (1862); *cf.,* Mass. Gen. Laws Ann. ch. 236, § 18 (West) ("if the property levied on is subject to a mortgage, it may be set off or sold subject to the mortgage and to the estate of homestead in the same manner as land subject to a mortgage only.")

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Sub-section 363(f)(5) authorizes the sale free and clear if "such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." Like sub-section (f)(1), the analytic difficulty is that the statute does not tell us who might be the hypothetical actor in what hypothetical circumstance. Unlike sub-section (f) (1), (f)(5) has two further ambiguities: (a) the hypothetical test is not limited to non-bankruptcy law; and (b) if the interest holder could be compelled to accept a money satisfaction, does the proposed sale have to provide for payment in full?

Who is The Actor? The cases are split on who must or may be the actor in the hypothetical proceeding. At least one case requires that the actor be the debtor.[51] Others look to proceedings of various kinds brought by various actors.[52]

Will Bankruptcy Law Cram Down Suffice? Here too, the cases are split. Most appear to be willing use confirmation under the cram down requirements of 11 U.S.C. §1129 as the "equitable proceeding."[53] The Ninth Circuit Bankruptcy

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[51] *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696, 711 (S.D.N.Y. 2014) ("This Court agrees that paragraph (5) should be read to reach only those legal or equitable proceedings that could be brought by the trustee as owner of the property."); *In re Haskell, L.P.*, 321 B.R. 1, 9 (Bankr. D. Mass. 2005) ("The Court finds that the only logical interpretation of the language of §363(f)(5) is that the statue requires that the trustee or the debtor be the party able to compel monetary satisfaction . . .")
[52] *In Re: Jolan, Inc.,* 403 B.R. 866, 870 (Bankr. W.D. Wash 2009), *cited with approval, In re Boston Generating, LLC, 440 B.R. 302, 333 (Bankr. S.D.N.Y. 2010)*
[53] *In re: Gulf States Steel,* 285 B.R. 497 (Bankr. N.D. Ala. 2002); *Grand Slam USA, Inc.,* 178 B.R. 462 (E.D.Mich. 1995); *In re Healthco Int'l, Inc.,* 174 B.R. 174, 176 (Bankr. D. Mass. 1994) ("however, a chapter 11 plan proponent can satisfy a secured claim, over the objection of the claimant, by cash payments having a present value equal to the value of the security interest. Such a 'cramdown' proceeding complies with the description of proceedings referred to in subparagraph (f)(5), and many courts have so held.") (Queenan, J.)

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Appellate Panel, has taken the contrary position, and required that the "equitable Proceeding" be something other than the bankruptcy code.[54]

Is Payment (In Full?) Required? Many cases hold that payment in full is not required. [55] While at least one reads the word "satisfaction" to require that there be some payment and that the interest not simply be terminated.[56] Other courts refer to Colliers for the proposition that:

> Collier on Bankruptcy, on the other hand, reads section 363(f)(5) as requiring payment of the full face amount of the claim secured by the lien unless the lien holder could be compelled to accept less than full payment through some legal or equitable proceeding. It cites two examples of proceedings in which the law would permit such a sale. First, under the Uniform Commercial Code, property may be sold free and clear of a lien for less than the full face amount of the claim if the property is sold in the ordinary course of business. Additionally, in a chapter 11 case, a plan may be confirmed that provides for a sale free and clear of a lien without payment in full of the claim as long as the lien holder is allowed to credit bid its claim at the sale.[57]

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[54] *In re PW, LLC*, 391 B.R. 25, 46 (B.A.P. 9th Cir. 2008) ("We thus hold that Congress did not intend under § 363(f)(5) that nonconsensual confirmation be a type of legal or equitable proceeding to which that paragraph refers. As a result, the availability of cramdown under § 1129(b)(2) is not a legal or equitable proceeding to which § 363(f)(5) is applicable.")

[55] *In re Healthco Int'l, Inc.,* 174 B.R. 174, 176 (Bankr. D. Mass. 1994); *In re: Terrace Chalet Apartments, Ltd.,* 159 B.R. 821 (D.C. N.D. Ill. 1993); *Matter of WPRV-TV, Inc.*, 143 B.R. 315, 321 (D.P.R. 1991) *vacated*, 165 B.R. 1 (D.P.R. 1992) *aff'd in part, rev'd in part sub nom. In re WPRV-TV, Inc.,* 983 F.2d 336 (1st Cir. 1993) (sale allowed under (f)(5) "upon payment of the actual value of the collateral"); *In re Grand Slam U.S.A., Inc.*, 178 B.R. 460, 462 (E.D. Mich. 1995) ("Thus, in a "cram down" procedure, a trustee may sell the assets of an estate free and clear, without the consent of a secured creditor, if present or future payments are made to the secured creditor in an amount equal to the present value of the collateral, even if such value is less than the debt.")

[56] *In re Hassen Imports P'ship*, 502 B.R. 851, 861 (C.D. Cal. 2013)

[57] *In re Canonigo*, 276 B.R. 257, 264-65 (Bankr. N.D. Cal. 2002)

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This brief review of the law of §363(f)(5) suggests that there is uncertainty attendant to its use.

CONCLUSION

There are three ways of understanding *Traverse.* The understanding that *Traverse* defines "property of the estate" in a fashion inconsistent with the teachings of *Schwab v.* Reilly is unsatisfactory. The understanding that it is simply a bad decision driven by sympathetic facts is unsatisfactory. Instead, we should take it as a lesson about the manner in which trustees in the future should present the proposed sale of a homestead property encumbered by an avoided lien.

The First Circuit was not presented with a proposed sale, nor with either a record or argument on the appropriateness of a sale free of the homestead interest under 11 U.S.C. §363(f)(5). We know that the First Circuit refused to allow sale free and clear, where the exempt homestead interest held by the debtor was not to be paid in full, under Section 363(b). The outcome, when presented under Section 363(f)(5) has yet to be tested.

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