Mergers and Acquisitions In the Post $100 a Barrel Era: On and Off 515 Rusk

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- For advice regarding the tax consequences of any transaction, consult your accountant and/or tax attorney.

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JDKG Attorneys practice in the following areas:

Appeals	Arbitration
Auto Dealerships	Banking
Bankruptcy and Creditor's Rights	Commercial Litigation
Common Carrier and Transportation	Corporate Transactions
Mergers and Acquisitions	Environmental Litigation
Insurance Coverage	Insurance Defense
Labor and Employment	Land Use
Oil & Gas/Energy	Real Estate
Succession Planning	Trusts & Estates

George A. Kurisky, Jr.

George Kurisky is a shareholder in Johnson DeLuca Kurisky & Gould, P.C. He is a corporate trained commercial litigation and transactional attorney. This background and experience gives him a solid foundation to proactively identify business issues and problems, as well as eliminate risks, on behalf of his clients. George's representation focuses on business clients, locally, regionally, nationally and internationally. George's areas of concentration include corporate transactions, mergers and acquisitions, rights, restructuring, bankruptcy and workouts. George has successfully defended his clients in hundreds of litigation, administrative, and arbitration matters.

George has successfully completed multiple mergers, acquisitions and disposition of micro-cap to large-cap businesses, protecting his clients' rights across a broad spectrum of concerns. This representation includes negotiation of agreements with consumer and floor plan lenders, consumer litigation, and compliance with the various administrative agencies. George currently represents both top publicly traded and closely held businesses, with a specialization in automobile dealer representation nationwide.

George's commercial litigation practice includes a variety of clients and matters. These matters include corporate governance and shareholder disputes, labor and employment issues, land use, breach of contract, creditors' rights, employment, real estate, and consumer defense matters.

George's active involvement has earned him the well-deserved reputation as a problem solver for both business clients and outside groups. He is a highly visible resource throughout the community, with an ability to make the right connections to get work done for clients time and cost efficient. His focus is on obtaining the appropriate cost-effective resources, whether they are inside or outside of the firm, to achieve a timely and positive result.

As a community leader, volunteer, and activist, George is involved in a myriad of civic, community, nonprofit, religious, and business-related groups and activities. He serves on the boards of numerous nonprofits, chambers of commerce, civic groups, benevolent societies, community associations, and educational foundations.

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OUR PHILOSOPHY

- THE FIRM IS FOUNDED ON A PHILOSOPHY OF BUILDING STRONG RELATIONSHIPS WITH ITS CLIENTS. THAT PHILOSOPHY HAS RESULTED IN STEADY GROWTH SINCE THE LAW FIRM'S INCEPTION.

- THE RELATIONSHIPS WE BUILD WITH OUR CLIENTS GO HAND-IN-HAND WITH OUR MISSION: TO PURSUE EVERY OPPORTUNITY TO MEET—AND EXCEED—OUR CLIENTS' NEEDS. WE PROVIDE SUPERIOR REPRESENTATION, QUICK RESPONSE TIMES, AND PERSONALIZED COMMUNICATION TAILORED TO EACH CLIENT'S NEEDS AND EXPECTATIONS. THIS, IN TURN, PROVIDES FOR INCREASINGLY BETTER LEVELS OF REPRESENTATION, WHICH FURTHER STRENGTHENS OUR RELATIONSHIPS WITH OUR CLIENTS.

- OUR PHILOSOPHY HAS ALSO BROUGHT TO US TOP LEGAL TALENT, ATTORNEYS WHO UNDERSTAND THAT RELATIONSHIPS ARE FORGED OVER TIME. WE STRIVE TO SOLVE OUR CLIENTS' IMMEDIATE NEEDS WHILE KEEPING THEIR LONG-TERM INTERESTS IN MIND.

- AS A RESULT, OUR EXISTING CLIENTS—AND OTHER ATTORNEYS—REFER NEW CLIENTS. WE INVITE YOU TO LET US PUT OUR PHILOSOPHY TO WORK FOR YOU.

Sixty-seven publicly traded oil and gas companies filed for Chapter 11 in 2015; 155 filed in 2020. Dozens more may file in 2023.

One quarter to one third of the world's publicly traded oil and gas companies are in danger of insolvency in 2023.

Armageddon or opportunity?
What's all this talk about bankruptcy?

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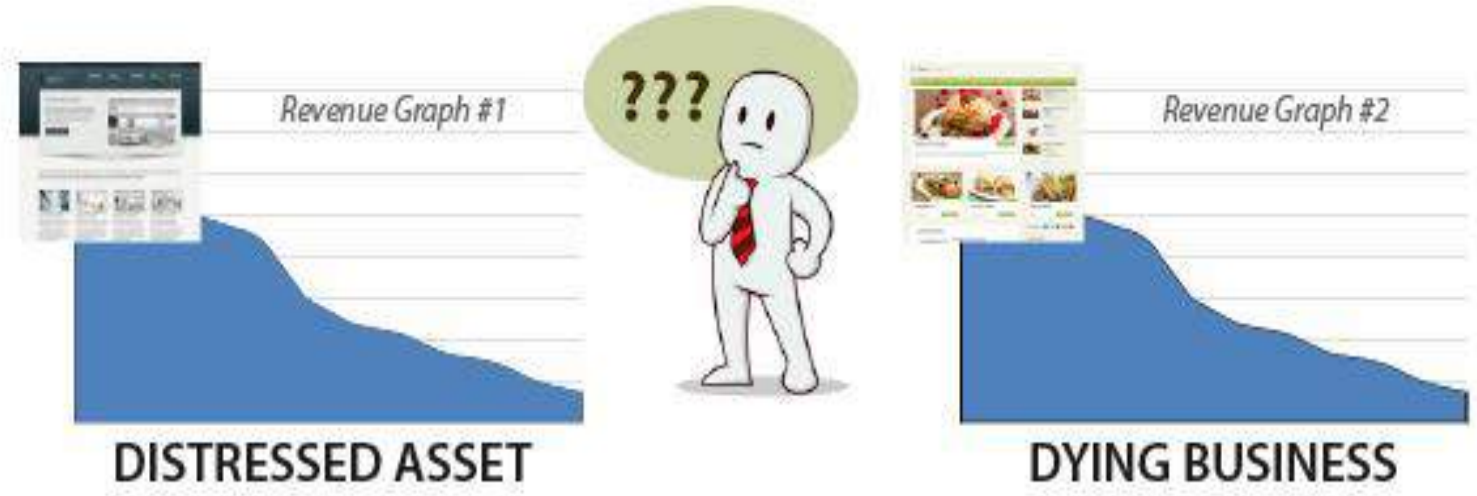

There are opportunities to purchase distressed businesses or the assets of distressed businesses. The path, however, is perilous. Buying distressed equity or distressed assets poses both unique opportunity and risks.

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Due diligence is critical for any buyer seeking to purchase a distressed business or its assets.

- Why is the business in distress? (This one is easy; Oil is $ 73.66 per barrel.)
- How much debt is the business carrying and what kind of debt?
- Are there any significant unforeseen liabilities lurking about? (Products liability suits or class action wage/hour claims.)
- Who is vetting representations and warranties?
- Are key staff performing effectively. Are they willing to weather the storm?

Diligence is the mother of good luck.
—Benjamin Franklin.

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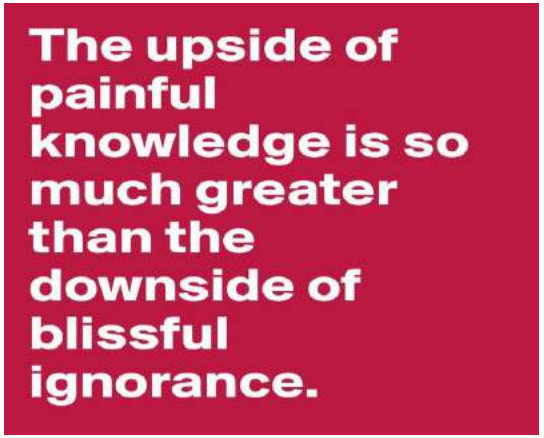

Protecting the Deal; Practice Tips

1. The deal should not contemplate antecedent debt.
2. Purchase assets, not equity.
3. Make a record supporting the price for assets purchased. Be able to prove that you paid "reasonably equivalent value."
4. Assure that sale proceeds stay with the target and are used for the benefit of its creditors, not as distributions.
5. Sign and close simultaneously, avoiding the risk of a bankruptcy filing between signing the purchase agreement and closing.
6. Escrow a substantial portion of the purchase price until all doubts are resolved.

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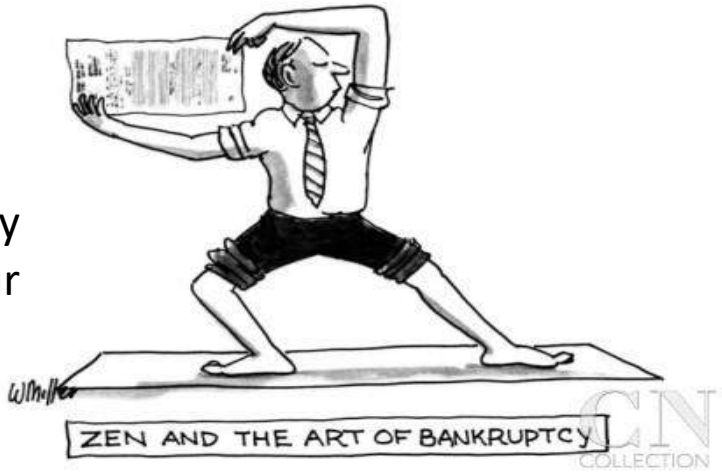
Bankruptcy



There are several types of bankruptcy proceedings. Most asset purchases will occur from a Chapter 7 or Chapter 11 case.

Chapter 7 is a liquidation. In this proceeding a trustee is appointed by the Court for the purpose of liquidating assets, prosecuting claims, and ultimately disbursing payments to creditors.

Chapter 11 is designed for business entities and individuals with large amounts of business debt. Chapter 11 can offer a means of reorganizing a business, or a means of selling off the business assets while allowing the business to retain control of the proceedings.

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Chapter 11: Reorganization?

Chapter 11 debtors are allowed to retain control of their assets and to conduct normal business activities during the course of the bankruptcy.

A debtor acting in this capacity is a "Debtor-in-Possession." A Debtor-in-Possession can sell assets without court approval if the sale occurs in the normal course of business. A Debtor-in-Possession can sell assets with the court's approval. Debtor can propose a plan of reorganization that calls for the sale of some or all of the debtor's assets.

A Chapter 11 plan can provide for the continued operation of the business, an adjustment of the debts owed by the debtor, or for the sale of certain business assets or the whole business.

The Chapter 11 Trustee:

Chapter 11 provides that the court may appoint a Trustee to take possession of and manage the affairs of the Debtor upon a showing that the Debtor-in-Possession commits fraud or acts contrary to the best interest of the estate.

The Trustee has the same powers and duties as the Debtor-in-Possession, and may propose a Chapter 11 plan, sell all or part of the debtor's assets, and may pursue litigation on behalf of the bankruptcy estate.

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Wait…. They filed Bankruptcy???
When a deal is not a deal.

The purpose of a bankruptcy filing is to maximize payment to creditors. Aggressive collection efforts prior to filing frustrate that purpose. Section 547 of the Bankruptcy Code allows a bankruptcy trustee to reverse certain pre-petition transfers.

What is a preferential transfer?

1. A payment for a debt that was previously incurred by the debtor.
2. Made to the creditor while the debtor was insolvent.
3. Made to a non-insider creditor within ninety (90) days of filing bankruptcy.
4. The payment allows the creditor to receive more money than it would receive had the payment not been made and the creditor's claim paid through the bankruptcy.

A bankruptcy Trustee can unwind a preference and sue the creditor that received the payment.

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Defending a Preference Action

1. Prove that the payment(s) were made in the ordinary course of business, not as the result of collections actions, or in accordance with industry standards.

2. Prove that new goods or services were provided to the debtor after the payment in question was made.

3. Prove that new goods or services were provided at the time of the payment that were of equivalent value to the money received. Prove that the parties intended the transaction to be a contemporaneous exchange (i.e. the debtor paid for the current goods or services, not the prior debt.)

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Constructive Fraud

- The party challenging the transfer must prove:

-The debtor received less than "reasonably equivalent value" in exchange for the transfer;

-The debtor is unable to pay debts at the time the transfer was made or as a result of the transfer.

- There is no need to prove that the debtor intended to hinder or defraud anyone.

Practice tip: Seek deals with competitive bids. Don't hesitate to pay fair market value. Deal at arm's length and not with companies or investors with established relationships.

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Fraudulent Transfers: Section 548

A bankruptcy Trustee can avoid pre-petition fraudulent transfers, suing the entity that received the transfer. When is a transfer fraudulent?

Actual Fraud:

-Transfer is made within one year before the bankruptcy is filed.

-Transfer is made with the intent to hinder or defraud a creditor.

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-Courts can infer fraud from circumstances like (1) the debtor facing suit as the transfer happens, (2) debtor retains possession or control of the transferred asset, (3) transfer of substantially all of the debtor's assets, and (4) the debtor has a special relationship with the receiving entity.

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Buying and Selling Assets in the Normal Course of Business

A Debtor-in-Possession can sell some or all of its assets in the normal course of business without the court's approval. This is subject to challenge from any party in interest. Valid challenges include, but are not limited to:

(1) challenging the value paid as improperly low;
(2) challenging the sale as not in the best interest of the creditors.

Now THIS is the regular course of business.

Assets can be sold by the debtor at any time during the course of a Chapter 11 pursuant to Section 363. This section governs the sale of assets outside the regular course of business. These sales require court approval. These sale are conducted "outside the plan" and can occur as early as 30 days after the debtor files bankruptcy.

A debtor can also sell assets at the conclusion of a Chapter 11 case under the terms of a confirmed plan of reorganization.

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Sales Under Section 363: The Sale Procedures Order

- The Sale Procedures Order is sought after a prospective purchaser is located and the terms of the sale are set.

- The prospective purchaser is known as the "stalking horse" bidder. The stalking horse bidder defines the deal. All subsequent activity is conducted for the purpose of securing a better proposal for the sale of debtor's assets.

- The sale procedures order governs the form of the notice of sale, the entities that must receive notice of the sale, the method of making and receiving bids, the assets to be sold, and the terms of the sale – whether the assets are sold clear of all liens.

- The order should specify how bidders may gather information on the assets to be sold, and how any auction of those assets will be conducted.

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Sales Under Section 363: The Sale Procedures Order

- Once a final offer is accepted by a Trustee or Debtor-in-Possession, a sale order is submitted to the Court for approval.
- If you are a buyer, the Sale Procedures Order is almost as important as the order approving the sale. It should require that other bidders demonstrate their financial ability to complete a purchase. It should establish a procedure for receiving overbids and the required amount of any overbid.
- The Sale Procedures Order should set a "break-up" fee to protect the stalking horse bidder in case another party purchases the asset.
- The stronger and more comprehensive the Sale Procedures Order, the easier it will be to secure approval of the Sale Order.

Sales Made Pursuant to a Confirmed Plan

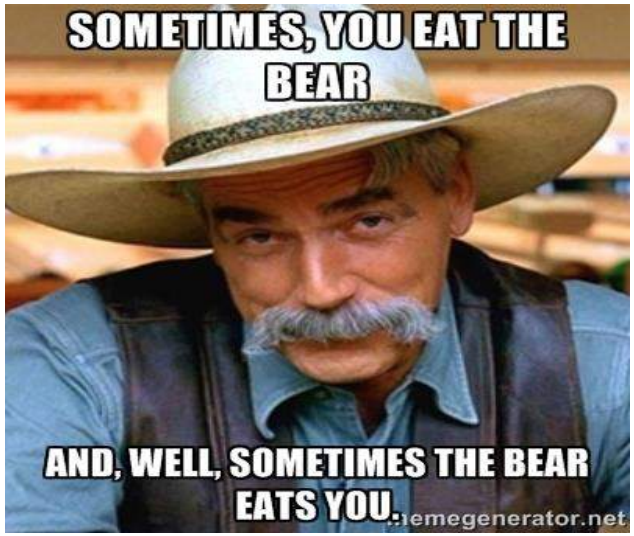
- Section 1123 of the Bankruptcy Code allows a debtor (or trustee) to confirm a plan that provides for the sale of all or part of a debtor's assets to one or more entities.

- These sales are more costly and time consuming than sales conducted pursuant to Section 363 because the plan must be confirmed before the sale can be concluded.

- Confirmation requires the preparation and approval of a disclosure statement, approval by the creditors, and confirmation of the plan over competing plans proposed by creditors' committees.

- Sales conducted pursuant to a Chapter 11 plan often do not involve competitive bidding. The court can refuse to substitute purchasers who make higher bids or agree to better terms. Thus, the only competitive bidding may be in the form of competing plans.

Potential Issues in Bankruptcy Sales



- Objections by other parties in interest. If a party objects, the court can only approve a sale if (1) non-bankruptcy law permits the property to be sold free and clear of liens, (2) the objecting party consents to the sale, (3) the price paid at sale is more than the aggregate amount of all liens encumbering the asset, (4) the interest of the objecting party is in bona fide dispute, or (5) the objecting party can be compelled in a legal Or equitable proceeding to accept a monetary satisfaction of its interest.

- Prospective purchasers are largely at the whim of the Trustee or Debtor-in-Possession because they do not control the sale procedures, the content of the Chapter 11 plan, or the dealings that precede the sale.

- The Sale Order can be vacated. Generally, once the sale is complete, third parties cannot challenge the sale. The Sale Order can be vacated where a potential purchaser shows that it did not receive notice in accord with the sale procedures order and it would offer a competitive bid. Inadequacy of the sale price alone is not sufficient ground to vacate the sale order.

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Potential Issues in Bankruptcy Sales

Successor Liability:

Outside of bankruptcy, an asset purchase generally does not impose successor liability on the purchaser. In bankruptcy, an asset purchase generally does not impose successor liability on the purchaser where the liabilities arose before the sale or confirmation date. Despite this general rule, a purchaser of assets in the course of a bankruptcy proceeding risks successor liability under certain circumstances.

Successor liability will occur where the debtor's liabilities are expressly or impliedly assumed. Courts look to the language of the purchase agreement, searching for ambiguity, to determine whether the purchaser intended to assume the seller's liabilities.

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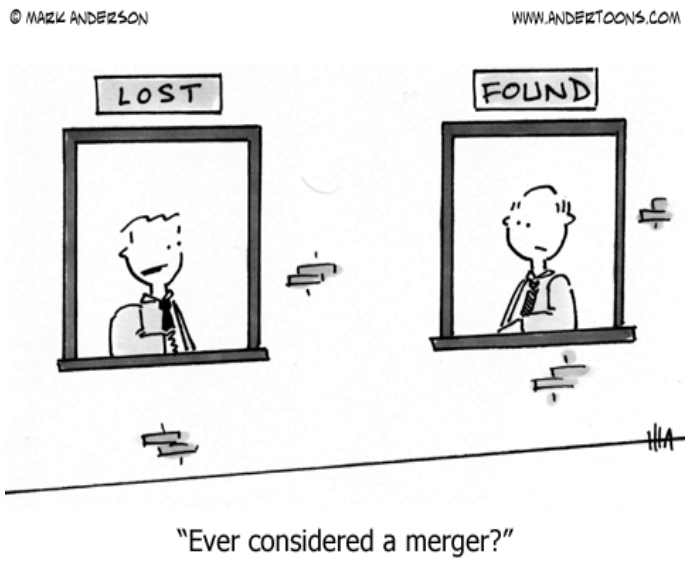
Potential Issues in Bankruptcy Sales



Successor liability may be imposed by the Court if there is a *de facto* merger. This occurs when the debtor company stops its operations, liquidates and dissolves, the purchaser assumes the liabilities and obligations of the seller necessary to continue business operations, the shareholders of the seller become the share-holders of the buyer, and the management, personnel, physical location, assets, and operations of the seller continue under the control of the purchaser.

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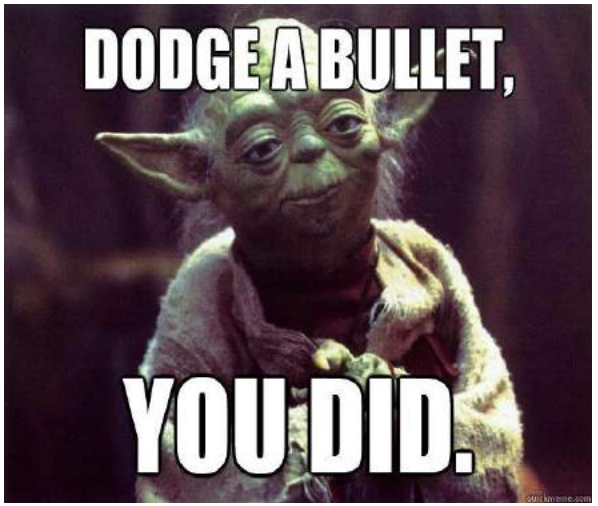
Issues in Bankruptcy Sales: Avoiding Successor Liability



Purchasers seeking to avoid successor liability should:

1. Investigate potential liabilities.
2. Obtain written consents or waivers from the seller's creditors.
3. State the exclusion of liabilities in broad form in the purchase agreement.
4. In the purchase agreement, narrowly identify all known liabilities that are not being assumed.
5. Avoid employing the same director, managers, and officers as the seller.
6. Change the name of the company.
7. Place a portion of the purchase price in escrow until issues of successor liability can be determined with certainty.
8. Seek indemnification from any solvent party from which it can be extracted.
9. Prepare a Sale Order that states that the assets are being sold free and clear of all liens and other creditor claims.

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Protections Afforded to Bidders and Buyers

The Bankruptcy Code, judicial authority, and the prevailing practice, provide protections to bidders and purchasers in a bankruptcy sale. Prospective buyers should negotiate to maximize these protections.

Break Up Fees. The stalking horse bidder generally conditions its offer to purchase the debtor's assets on reimbursement of its expenses and payment of a "break up fee" if the proposed sale does not occur. This fee compensates the bidder for the time and expense of performing due diligence and arranging the sale, and to compensate it for lost opportunities. The breakup fee encourages the bidder by reducing its fear of lost out-of-pocket and opportunity if its offer is not ultimately successful.

Break up fees require court approval and courts around the country impose different standards to determine when such fees are appropriate. The Fifth Circuit applies Section 363's "business judgment" standard in approving payment of a breakup fee. This standard sets a very low bar by only requiring a showing that the Debtor-in-Possession (or Trustee) exercised it's "best business judgment" in agreeing to the fee.

Protections Afforded to Bidders and Buyers

The Good Faith Purchaser.

If the bankruptcy court finds that the buyer purchased assets in good faith, the buyer will receive additional protections under Section 363(m). Section 363(m) guarantees the validity of the sale if an appeal is taken unless the party opposing the sale secures an order from the court staying the sale order. This provision is designed to protect a good faith purchaser from collateral attacks on the sale and the sale procedures. To determine good faith, courts consider whether the sale involved fraud by any party, any collusion between the purchaser and other bidders, attempts to take grossly unfair advantage of the other bidders, and whether the sale price is inadequate.

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Protections Afforded to Bidders and Buyers

The Sale Order:

The bankruptcy court's order approving the sale can help minimize collateral attacks on the sale or on the purchased assets. The sale order should always contain these findings of fact:

(1) The purchase is in good faith;
(2) The terms of the sale were candidly disclosed;
(3) Sufficient cause exists to justify the sale;
(4) The sale is in the best interest of the estate;
(5) The assets sold will be sold free and clear of all liens;
(6) The sale is for fair market value;
(7) The notice of sale was provided in accordance with the sale procedures order.

The Court's findings of fact may be overturned only if they are found to be clearly erroneous. These finding may make it more difficult for unsuccessful bidders to undo the sale or encumber the purchased assets.

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Other Concerns in Business Bankruptcies

In addition to the concerns surrounding the purchase of assets from a bankrupt business, the Bankruptcy Code poses other challenges to a potential purchaser. These challenges include the preservation and termination of executory contracts and steering clear of the Trustee's avoidance powers.

Executory Contracts and Unexpired Leases

-Not defined by the Bankruptcy Code.

-Courts have defined executory contracts as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."

-The Trustee or Debtor-in-Possession is allowed a "reasonable time" to decide whether to assume or reject these contracts. What constitutes a "reasonable time" is left to the court's discretion.

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Other Concerns in Business Bankruptcies

How to assume an executory contract:

(1) Obtain an order permitting assumption,
(2) Confirm a plan of reorganization that provides for assumption.

What happens next?

(1) The contract is assumed in its entirety.
(2) The bankruptcy estate is bound by the contract.
(3) Amounts owed under the contract will be administrative expenses which are generally entitled to be paid in full.
(4) Assumption will not be permitted unless all monetary defaults are promptly cured, and adequate assurance of the debtor's future performance provided.

Other Concerns in Business Bankruptcies

Debtors seeking to sell assets will file a motion asking to sell the asset "free and clear of all liens. "Lien" includes everything from UCC security interests to judgment liens. Debtor will seek authority to sell free and clear of all liens because buyers want clear title to the assets.

The debtor may also move to assume and assign all executory contracts and leases. Parties to these agreements should follow the sale process closely because their rights may be affected.

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Other Concerns in Business Bankruptcies

The sale process.
-Debtor will likely provide notice to parties to executory contracts indicating which contracts will be assumed and assigned.
-The notice will typically list the amount the debtor proposes to pay to "cure" any default.

Scream or Die.
-Parties opposing assumption and assignment of their executory contracts must object or forfeit their rights.
-Parties can object to the assignment of the contract, to assignment to the particular buyer proposed, or to the amount proposed to cure defaults.
-Objections must be in writing and filed before the deadline specified
-in the notice. "Screaming" after the deadline will be a useless gesture.

Other Concerns in Business Bankruptcies (O/G)

Specific Executory Contracts

Mineral Leases are not executory contracts.

Operating Agreements ARE executory contracts. The purchaser of a debtor's assets, including the right in and to a joint operating agreement should be cognizant of whether the contract has been assumed or rejected and the capital demands that may immediately be made on the purchaser.

Employment Contracts and Non-Compete Agreements are executory contracts. Employment contracts are subject to rejection. They must be accepted or rejected in their entirety, including all agreements appurtenant to the employment contract. This includes the employee's non-compete agreement.

Make your list, check it twice

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