What is a Section 363 Bankruptcy Sale and How Does the Process Work?

A Section 363 sale is a sale of a company's assets pursuant to Section 363 of the Bankruptcy Code. The Bankruptcy Court will approve a 363 sale if the debtor can demonstrate a "substantial business justification" for the sale.

Key Issues

In general, Section 363 bankruptcy sales proceed as follows:

- **Marketing of Assets.** The debtor begins by marking its assets for sale, often with the help of an investment banker. In many bankruptcy cases, the debtor will select a purchaser to serve as a stalking horse bidder, the bidder who sets the floor, which all other bidders will need to bid against. The debtor and stalking horse bidder then prepare an asset purchase agreement, which typically becomes the form of asset purchase agreement (APA) other bidders must use as a baseline.
- **Approval of Bid Procedures.** The debtor files a motion seeking approval of the stalking horse bid (and of the certain benefits the stalking horse bidder will receive if they are outbid), the sale time, the requirements for submitting bids, and the rules for the auction. The bid procedures also approve notice to contact parties regarding the treatment of their contract and the deadline for objecting to proposed cure claims, and adequate assurance of future performance by the purchaser. Additionally, the bid procedures establish the deadline to object to the sale of the debtor's assets to the purchaser.
- **Due Diligence Period and Submission of Bids.** After the court approves the bid procedures, notice is given to potential bidders of the deadline to submit their bid. The length of time from entry of the order approving the bid procedures to the deadline to submit bids varies from case to case and is dependent on such factors as pre-petition marketing efforts, the deteriorating nature of the assets, etc. The debtor will also establish a data room for potential bidders. Section 363 sales are typically on an "as-is, where-is" basis with limited representations and warranties, indemnity rights, or other post-closing recourse for buyers, so it is critical that a potential buyer carefully conduct due diligence on the assets and liabilities of the company. During this period, the debtor will also serve notice on contract and lease counterparties regarding such issues as cure claims and objections deadlines related to contract issues and the sale.
- **Auction.** At the start of the auction, the debtor will announce the leading bid and how the auction will proceed. The auction process ensures that a fair price is received for the assets. At the conclusion of the auction, the debtor will announce the bid constituting the highest or otherwise

best offer. Although unusual, sometimes a lower cash offer is selected as the winner. Reasons for this might include certainty regarding closing, the ability to close quicker, an ongoing business versus a liquidation, etc.

- **Sale Hearing and Closing of the Sale.** The sale hearing usually occurs within a few days of the auction. At the sale hearing, the Bankruptcy Court will enter an order approving the sale of the assets to the winning purchaser. Bankruptcy courts often waive the 14-day stay imposed on sales by the bankruptcy rules, and sales often close within a day or so after obtaining Bankruptcy Court approval.

Takeaway

Section 363 sales can move quickly, especially where a stalking horse bidder has been selected before the bankruptcy filing, and often occur within 45 days and 90 days after the bankruptcy case is filed. Section 363 sales offer many advantages for debtors, creditors, and potential purchasers. Certain parties' rights (including parties to contract and leases with the debtor) can be affected as a result of the sale. It is important that creditors pay careful attention to any notice they receive regarding the sale and consult with counsel as necessary.