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HEADNOTE: RESTRUCTURINGS
Steven A. Meyerowitz 289

363 ASSET SALES: THE LATEST RESTRUCTURING TOOL
Howard J. Berman **291**

DEALING WITH TROUBLED TRIBAL CASINOS
Michael M. Eidelman, Terence M. Dunleavy, and Stephanie K. Hor-Chen 302

EXEMPTIONS FROM SECURITIES ACT REGISTRATION REQUIREMENTS UNDER SECTION 1145 OF THE BANKRUPTCY CODE
Charles H. Jeanfreau 313

NEW BULLET LCDS CONTRACT REPLACES CANCELLABLE CONTRACT
Paul N. Watterson, Craig Stein, and Kristin Boggiano 327

AN OVERVIEW OF THE NAIC SOLVENCY MODERNIZATION INITIATIVE
Elizabeth K. Brill and Michael K. McDonnell 333

CREDITORS' RIGHTS COVERAGE DECERTIFIED BY ALTA AND WITHDRAWN BY TITLE INSURANCE COMPANIES
Walter R. McCabe III, Richard E. Gordet, and Daniel L. Stanco 339

FTC ISSUES NOTICE OF PROPOSED RULEMAKING ON MORTGAGE ASSISTANCE RELIEF SERVICES
Brian P. Brooks, Timothy J. Muris, Maryanne S. Kane, and Lilit Voskanyan 345

LEHMAN, SETOFF, AND THE INAPPLICABILITY OF THE "SAFE HARBOR" PROVISIONS: MUTUALITY REMAINS INTACT
Norman S. Rosenbaum, Brett H. Miller, Alexandra Steinberg Barrage, and Kristin A. Hiensch 359

THIRD CIRCUIT RULES SECURED CREDITORS DO NOT HAVE A RIGHT AS A MATTER OF LAW TO CREDIT BID IN BANKRUPTCY PLAN SALE
Steve Schwartz, Carey Schreiber, and Sarah Trum 367

NEW YORK COURT OF APPEALS DECISION SIGNIFICANTLY AFFECTS MULTINATIONAL FINANCIAL INSTITUTIONS, REQUIRING THAT CUSTOMER ASSETS HELD BY A BANK OUTSIDE THE UNITED STATES BE MADE AVAILABLE IN NEW YORK TO SATISFY A JUDGMENT AGAINST THE BANK'S CUSTOMER
Charles E. Dropkin, Harry Frischer, and Stephen L. Ratner 373

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363 Asset Sales: The Latest Restructuring Tool

HOWARD J. BERMAN

The author of this article explains how asset sales work under Section 363(b) of the Bankruptcy Code, and examines the expeditious asset sales of Chrysler and General Motors. The author concludes that when companies face severe liquidity constraints and do not have sufficient financing, buyers should be able to acquire financially distressed businesses and restructure them through use of a 363 sale.

In the last two years, the dearth of credit available for many companies in financial distress along with declining asset values resulted in the filing of a significant number of asset sale cases as the only way to salvage the business and jobs. Sale cases also present unusually attractive investment opportunities for public and private companies, private equity and hedge funds, and other investors with capital and an ability to move expeditiously.

The asset sales of Chrysler and General Motors were each approved by the bankruptcy court in approximately 35 days and resulted in a complete restructuring of each corporation's assets and liabilities outside a plan of reorganization through a sale under Section 363(b) of the Bankruptcy Code (the "Code"). The sale of Lehman Brothers was even swifter: the court approved the sale of its assets for $1.7 billion in cash and the

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assumption of approximately $45.5 billion of liabilities only five days after the Chapter 11 had been filed. The ability to quickly restructure and acquire a complex, multinational operating business in a Section 363 sale highlights the advantages of buying and selling assets in bankruptcy when a company is in financial difficulty.

ADVANTAGES OF ASSET SALES WITHIN BANKRUPTCY

An asset sale may be conducted either outside of a plan of reorganization pursuant to Section 363(b) of the Code or as part of a plan. The plan can be a reorganization plan or a plan of liquidation. A Section 363 asset sale can be implemented and consummated much more quickly and at far less cost than a sale done as part of a plan of reorganization, because the latter requires compliance with all of the detailed confirmation requirements of Section 1129 of the Code, including approval of a disclosure statement and successful solicitation and voting on the plan. These advantages are even more pronounced when dealing with smaller financially distressed companies where there are fewer complexities.

There are other reasons why a sale of assets in bankruptcy is advantageous. First, a bankruptcy sale has the advantage of transferring title to the assets free and clear of any "interest" in the property to be sold. Consequently, assets can be sold "free and clear" of liens, claims and encumbrances, with the liens, claims and encumbrances attaching to the proceeds of sale, leaving the purchaser with clear title.[1]

Second, a bankruptcy sale of assets may avoid the risk of successor liability claims.[2] However, there is uncertainty as to whether or not this risk, particularly as to future claims, may be entirely eliminated by conducting the sale of assets in a bankruptcy case.[3] In *Chrysler*, claims for successor liability were extinguished by a 363 sale; however, on appeal the Second Circuit declined to address the ability of the bankruptcy court to extinguish future claims until the court was presented with an actual injury claim caused by old Chrysler.[4] Likewise, in *General Motors*, the bankruptcy court, following *Chrysler I*, held that successor liability claims were extinguished by a 363 sale.[5]

Third, leases and executory contracts are easier to transfer in bank-

ruptcy because restrictions on transfer such as anti-assignment clauses, which are generally enforceable outside of bankruptcy, are unenforceable in bankruptcy.[6] Also, because unprofitable contracts and leases can be rejected by a debtor under Section 365 of the Code, the buyer is able to pick and choose which contracts it wants to keep.[7]

Lastly, sales outside of bankruptcy can be challenged under state law as fraudulent conveyances when creditors think the sale price is inadequate. The risks of fraudulent conveyance attack are eliminated when the sale is conducted under bankruptcy court supervision since Section 548 of the Code, which grants the trustee the power to avoid fraudulent transfers, applies only to pre-petition transfers.[8] Moreover, the bankruptcy court approves the sale agreement and other sale terms, thereby giving the purchaser additional protection.

THE SALE PROCESS

Due Diligence

A company facing financial difficulty that wishes to sell its business to preserve its going concern value usually retains an investment banker to assist in the marketing and sale of the business. A "data room" or "e-room" with financial and operating information about the company will be made available to those prospective purchasers who sign a confidentiality agreement. A company that is insolvent has a fiduciary duty to its creditors and other stakeholders to maximize the value of its assets. Nonetheless, a buyer has the ability to take advantage of the distressed seller's marketing efforts by conducting significant due diligence early in the marketing process. This should enable a buyer to obtain a clear understanding of the strengths and weaknesses of the business, which assets are desirable and should be acquired, which contracts should be assumed and which employees need to be retained. A buyer's ability to conduct due diligence early in the process also will enable the buyer to structure the transaction and negotiate the asset purchase agreement in a manner that is most advantageous to the buyer, including various bidding protections that may make it more difficult for other interested purchasers to bid successfully for the assets.

Sale Structures

The structure of a sale for which bankruptcy court approval will be obtained can take many forms. It can be a straight acquisition of specific assets for cash or a combination of cash, notes and/or equity of the buyer. The consideration also can be structured as part cash plus the assumption of liabilities or just the assumption of liabilities. In certain circumstances, the buyer may want to structure the acquisition as a "loan to own" transaction where the buyer either acquires the senior secured debt and/or makes a debtor-in-possession loan to the seller to finance the company's operations until the sale is closed. Under this structure, the buyer obtains the right to credit bid its secured debt as either all or part of the consideration for the purchase price. This structure can give the buyer control over the auction and sale process, because the debtor-in-possession financing agreement can contain various milestones as to the timing of bids, the sale hearing, bid procedures and the duration of the financing.

The Asset Purchase Agreement

Once the buyer reaches an agreement in principle with the debtor for the purchase of the assets, the parties will negotiate and enter into an asset purchase agreement. Typically, the asset purchase agreement will contain provisions that the assets being sold are "as is" "where is" with "all faults" and that the sale is subject to higher and better offers and the approval of the bankruptcy court. A debtor/seller will try to limit the representations and warranties in the agreement. But if the buyer has negotiating leverage, the asset purchase agreement may contain certain representations and warranties that are usually found in a purchase agreement done outside of bankruptcy.

Bidding Protections

Because the asset sale is subject to higher and better offers at an open auction and also subject to court approval, prospective buyers should be reluctant to act as a "stalking horse" without some form of protection or compensation for their efforts.[9] Because the seller wants a stalking horse

bid that establishes a floor for the value of the assets as well as the terms and conditions of the asset purchase agreement that can be shopped to other interested bidders, the prospective buyer will have leverage prior to execution of a definitive purchase agreement to negotiate bidding protections and other bidding procedures that govern the auction, such as:

- The timing of the date for other bids;
- The date of the auction sale;
- The amount of the break-up fee and/or expense reimbursement;
- The overbid amounts pursuant to which subsequent bids must exceed prior bids;
- The amount of any deposit that must be submitted by a competing bidder; and
- The qualifications competing bidders must provide to demonstrate their ability to close the sale within the specified deadline.

The most common bid protection devices are break-up fees, reimbursement of due diligence expenses and minimum bidding increments.[10] These bidder protection devices are not enforceable without court approval. A break-up fee is a payment of a sum of money to the stalking horse bidder if the sale to such bidder is not consummated because it was topped by another bidder's higher offer or the seller terminates or breaches the agreement and the purchaser is not in default at the time of termination or breach by the seller. Break-up fees ranging from one percent to four percent of the purchase price are usually approved by bankruptcy courts.[11] The purpose of the break-up fee is to compensate the initial or stalking horse bidder for the time and expense in entering into the transaction, as well as its lost opportunity costs. An expense reimbursement provision can be used in conjunction with a break-up fee to reimburse the initial bidder's expenses in conducting its investigation of the seller's assets, preparing its bid and negotiating a purchase agreement.[12] Such expenses can include legal, accounting, investment banking and other professional fees and expenses incurred by the bidder, which are typically capped at a negotiated sum.[13] Of all the bidding protections, an expense reimbursement is

the least controversial and the easiest for which to obtain court approval.

Minimum overbid amounts are the amounts by which competing bids must exceed the earlier bid.[14] The amount by which the first opening bid must exceed the original offer equals the sum of any break-up fee and/or reimbursement expense plus the minimum overbid amount. Lastly, a buyer may be able to negotiate a window-shop provision, which prohibits the debtor from soliciting higher and better offers from other sources for a specified period of time, but allows the debtor to consider unsolicited offers, provide information, and under certain circumstances, accept a competing offer.[15]

The Auction and Sale Hearing

Once the debtor and the initial bidder have entered into an asset purchase agreement, the debtor will file a motion to:

- Approve the bidding procedures, including the date when other bids must be submitted, the amount of the deposit that must accompany a bid, the amount of the break-up fee and/or expense reimbursement, the overbid amounts and other rules that will govern the auction;
- Set a hearing date and objection deadline with respect to the proposed bidding procedures;
- Set the time, date, and place of the auction sale;
- Approve the proposed sale to the initial bidder or such other bidder making a higher and better offer;
- Set the time and date of the hearing to approve the sale and the assumption and assignment of executory contracts and leases; and
- Set the deadline for objections to the sale and the assumption and assignment of executory contracts and leases.

The Bankruptcy Rules require that not less than 21 days' notice of a proposed sale of property outside the ordinary course of business be given to all creditors and other parties in interest.[16] When a sale involves substantially all of the debtor's assets, it is not unusual for the process to

take approximately 60 days or more so that adequate notice can be given of the hearing on approval of bidding procedures, with sufficient time to allow the debtor to market the property and solicit higher and better offers prior to the auction. However, in an emergency, such as a limited time period imposed by a lender to obtain approval of the sale or the likelihood that the assets will deteriorate (also referred to as the "melting ice cube" theory), the court has discretion to shorten the notice and hearing dates to consider the sale.[17] In *Chrysler*, the court held a hearing on proposed bid procedures five days after the Chapter 11 case was commenced; the hearing to approve the sale was commenced 27 days after the Chapter 11 petition was filed; and the court entered a decision approving the sale on the 33rd day of the Chapter 11 case. Similarly, in *General Motors*, the court expedited the hearings on the sale, which was approved on the 35th day of the Chapter 11 case, because General Motors' debtor-in-possession financing would terminate if the sale was not approved within 40 days of the petition date and absent prompt approval of the sale, the debtor would be forced to liquidate. It is noteworthy that in both of these cases the debtors had solicited bids before the Chapter 11 filing (with no success), debtor-in-possession financing was not available from the commercial markets, and there was no possibility of a stand-alone plan.

STANDARD FOR OBTAINING APPROVAL OF SALE OF ASSETS OUTSIDE A PLAN

Because the Code contemplates that the reorganization of the debtor will be undertaken in accordance with a plan for which detailed procedures on claims, classification, treatment, voting and disclosure must be followed, sale transactions of substantially all the assets of a company that constitute a *sub rosa* plan of reorganization — an attempt to circumvent the requirements for plan confirmation by dictating the terms of a future plan — are prohibited.[18] To obtain approval of a sale of substantially all of a debtor's assets outside a plan, the debtor must show that there is a good business reason for the sale.[19] Accordingly, where the sale transaction has a sound business justification that can lead towards confirmation of a plan and is not designed to evade the plan confirmation process, the transaction

is deemed proper.[20] Moreover, courts will approve such sales when there are exceptional circumstances, such as the need to preserve and maximize the debtor's going concern value and prevent liquidation, inadequate revenues to support the debtor's continued operations, or the lack of available financing.[21]

Both the *Chrysler* and *General Motors* cases are good examples of such exceptional circumstances where asset values and recoveries to creditors would have deteriorated absent the sale. In both cases, newly government sponsored entities were formed to acquire substantially all of the assets of each debtor so that the new company could operate free of burdensome entanglements with the old entities that remained in Chapter 11 in order to liquidate the bad assets and resolve claims. In *Chrysler*, in exchange for the transfer of the assets to New CarCo Acquisition LLC ("New Chrysler"), New Chrysler agreed to assume certain liabilities of the old entity and pay old Chrysler $2 billion in cash. In addition, in consideration of a 20 percent equity interest with the right to acquire up to an additional 31 percent of New Chrysler's equity, Fiat agreed to provide access to certain technology, distribution capabilities in other markets and other cost-saving opportunities. As part of the transaction, New Chrysler agreed to issue equity interests, of which 55 percent were allocated to a health care trust for the union, eight percent to the U.S. Treasury, and two percent to the Canadian government. In *General Motors*, the debtor received from Vehicle Acquisitions Holdings LLC ("New General Motors") approximately $45 billion of consideration plus the value of 10 percent of the post-closing outstanding shares of New General Motors and warrants to purchase 7.5 percent of the common stock of New General Motors. Like Chrysler, the U.S. Treasury, the Canadian government and a health care trust for the union would own significant equity interests in New General Motors. Given the fact that there were no alternative sources of debtor-in-possession financing, which financing would terminate absent prompt approval of the sale, no other competing bids and the alternative to an immediate sale was the liquidation of each company, the sales of Chrysler and General Motors were approved.

The courts in *Chrysler* and *General Motors* concluded that each sale did not constitute a *sub rosa* plan because in each case the sale brought in value that would be shared by creditors pursuant to a plan subject to

confirmation by the court and each transaction did not dictate how the sale proceeds were to be distributed in a subsequent plan.[22] The courts were not troubled by the fact that each purchaser was assuming certain liabilities and excluding others (such as bond debt) since the transaction structures were not deemed to be an attempt by the debtors to evade the Code's distribution scheme. Nor did the courts agree with the argument that the grant of ownership interests to certain pre-petition creditors (the U.S. Treasury, the Canadian government and the union) without satisfying the claims of senior creditors was a violation of the absolute priority rule, because the allocation of the new equity to certain pre-petition creditors was on account of new value, including governmental loans, new technology and new management, which was not an asset of the estate.[23] Accordingly, the allocation of the new equity was "neither a diversion of value from the Debtors' assets nor an allocation from the proceeds of the sale of the Debtors' assets."[24] Notably, the Second Circuit recognized that a 363 sale could in effect be a reorganization.[25] While a sale of substantially all of the debtors' assets will always have an "enormous influence on any eventual plan," the court noted that as long as the sale does not dictate or require by contract the terms of a plan, such a transaction would not constitute a *sub rosa* plan.[26]

CONCLUSION

The speed within which Chrysler and General Motors were restructured through a Section 363 sale process demonstrates the efficacy of buying and selling assets in bankruptcy. When companies face severe liquidity constraints and do not have sufficient financing, buyers should be able to acquire financially distressed businesses and restructure them through use of a 363 sale. Moreover, with a plethora of distressed companies, an abundance of equity capital and general investor caution in the marketplace, aggressive companies and funds have unusual opportunities to buy troubled firms, pare expenses and realize healthy investment returns.

NOTES

[1] *See* 11 U.S.C. § 363(f).

[2] *See, e.g., In re General Motors Corp.*, 407 B.R. 463, 505-06 (Bankr. S.D.N.Y. 2009) (assets transferred to purchaser free and clear of successor liability claims), *aff'd*, *Parker v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, No. 09 Civ. 7794, 2010 WL 173082, (S.D.N.Y. Apr. 28, 2010) *and appeal dismissed as moot sub nom. Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, No. 09 Civ. 6818 (NRB), 2010 WL 1524763 (S.D.N.Y. Apr. 13, 2010), *appeal docketed*, No. 10-1979 (2d Cir. May 17, 2010); *In re Chrysler LLC ("Chrysler 1")*, 405 B.R. 84, 111 (Bankr. S.D.N.Y. 2009) (tort claims are interests in property that are extinguished by a free and clear sale under Section 363(f)(5)), *aff'd, Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot*, 103 S.Ct. 1015 (2009); *Am. Living Sys. v. Bonapfel (In re All Am. of Ashburn, Inc.),* 56 Bankr. 186 (Bankr. N.D. Ga.), *aff'd*, 805 F.2d 1515 (11th Cir. 1986) (holding that the Bankruptcy Code preempts state tort doctrines of successor liability).

[3] *See, e.g., Wilkerson v. C.O. Porter Machinery Co.,* 237 N.J. Super. 282, 567 A.2d 598 (1989) (state court finding successor tort liability and declining to find that Bankruptcy Code preempts state tort laws); *Accord Wensing v. Paris Indus.-New York*, 158 A.D. 2d 164, 558 N.Y.S. 2d 692 (3d Dept. 1990).

[4] *See Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 127 (2d Cir. 2009) *vacated as moot*, 130 S.Ct. 1015 (2009).

[5] *See General Motors*, 407 B.R. at 505-06.

[6] *See* 11 U.S.C. § 365(f).

[7] The rejecting party is usually required only to demonstrate that rejection of the executory contract is consistent with the exercise of reasonable business judgment.

[8] *See* 11 U.S.C. § 548(a). *See also In re Nemeti*, 65 Bankr. 391 (Bankr. N.D.N.Y. 1986) (Section 548 does not apply to post-petition transfers).

[9] *See* Howard J. Berman, *The Use of Bidding Incentives in Bankruptcy Asset Sales*, *in* Bankruptcy Business Acquisitions at 18-1 (Richard N. Tilton 2d ed., American Bankruptcy Institute 2006).

[10] Other bid protection devices are topping fees, rights of first refusal, no-shop and lockup provisions. *See id*. at 18-4 - 18-9.

[11] *See id*. at 18-4.

[12] *See id*. at 18-5.
[13] *See id*.
[14] *See id.* at 18-6.
[15] *See id.* at 18-7 - 18-8.
[16] *See* Bankruptcy Rule 2002(a)(2).
[17] *See* Bankruptcy Rules 2002(a)(2) and 9006(c).
[18] *See Motorola v. Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F. 3d 452, 466 (2d Cir. 2007); *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F. 2d 935, 940 (5th Cir. 1983).
[19] *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F. 2d 1063, 1070-72 (2d. Cir. 1983). In determining whether there is a good business reason for approval of the sale, *Lionel* requires the bankruptcy court to consider the following factors: (i) the proportionate value of the asset to the estate as a whole; (ii) the amount of the elapsed time since the following of the bankruptcy petition; (iii) the likelihood that a plan of reorganization will be proposed and confirmed in the near future; (iv) the effect of the proposed disposition on future plans of reorganization; (v) the proceeds to be obtained from the disposition compared with any appraisals of the property; and (vi) whether the asset is decreasing or increasing in value. *Id*. at 1071.
[20] *See Chrysler I*, 405 B.R. at 96 (citing *In re Iridium Operating LLC*, 478 F.3d at 467).
[21] *See Chrysler,* 405 B.R. at 96 (citation omitted).
[22] *See General Motors*, 407 B.R. at 495-96; *Chrysler I*, 405 B.R. at 98.
[23] *See Chrysler II*, 576 F.3d at 118.
[24] *See Chrysler I*, 405 B.R. at 99.
[25] *See Chrysler II*, 576 F.3d at 117-18.
[26] *Id*. at 118 n. 9.