Buying Distressed Assets Out of Bankruptcy

The global pandemic and related economic challenges have resulted in a number of new bankruptcy filings. As a result, there are new opportunities for prospective buyers of distressed assets. This is especially true for those who recognize the advantages of buying assets out of bankruptcy.

A debtor's assets can be sold as part of a business reorganization under chapter 11, or as part of a business liquidation under chapter 7. The sale of a debtor's assets in a bankruptcy case requires approval by the bankruptcy court. The sale may be accomplished as part of the debtor's plan of reorganization or the sale may be pursued through a motion filed under Section 363 of the Bankruptcy Code (a "363 Sale").

Prospective buyers tend to find that 363 Sales present significant advantages. For example, in a 363 Sale (as opposed to a non-bankruptcy sale), the bankruptcy court will typically approve the sale of assets free and clear of liens and liabilities, except those the buyer agrees to assume or certain liabilities that run with the land. In the context of a 363 sale, a buyer may also have the ability to purchase certain assets in ways not possible outside a bankruptcy context, such as avoiding any provisions in contracts that would impede the assumption of the contracts. A 363 Sale is also typically a less expensive and more efficient way to purchase assets when compared to consummating a sale as part of a debtor's plan of reorganization.

In the context of a 363 sale, an auction is conducted to ensure the debtor obtains the highest and best price for the assets to be sold. The initial party to execute an asset purchase agreement ("APA") with the debtor is referred to as the "stalking horse." Once the bankruptcy court approves the APA between the debtor and the stalking horse, the stalking horse's bid will be the starting point from which other bidders submit their bids. The stalking horse has the ability to set the initial price and sale terms, and to negotiate the bid procedures, such as bidder qualifications and the bid deadline. The stalking horse can also negotiate for certain bid protections, such as a break-up fee or the right to match subsequent bids, and it may also have the time and ability to conduct a more thorough due diligence of the debtor's assets than other bidders. These are advantages not always afforded to prospective buyers of distressed assets outside of bankruptcy.

If you are interested in purchasing assets in a debtor's bankruptcy case, you will need to be prepared to negotiate with the debtor, its lenders, unsecured creditors, and more. Our bankruptcy team can discuss your options and assist you in developing a successful strategy to navigate the bankruptcy court.

For more information, please contact Lisa Norman.