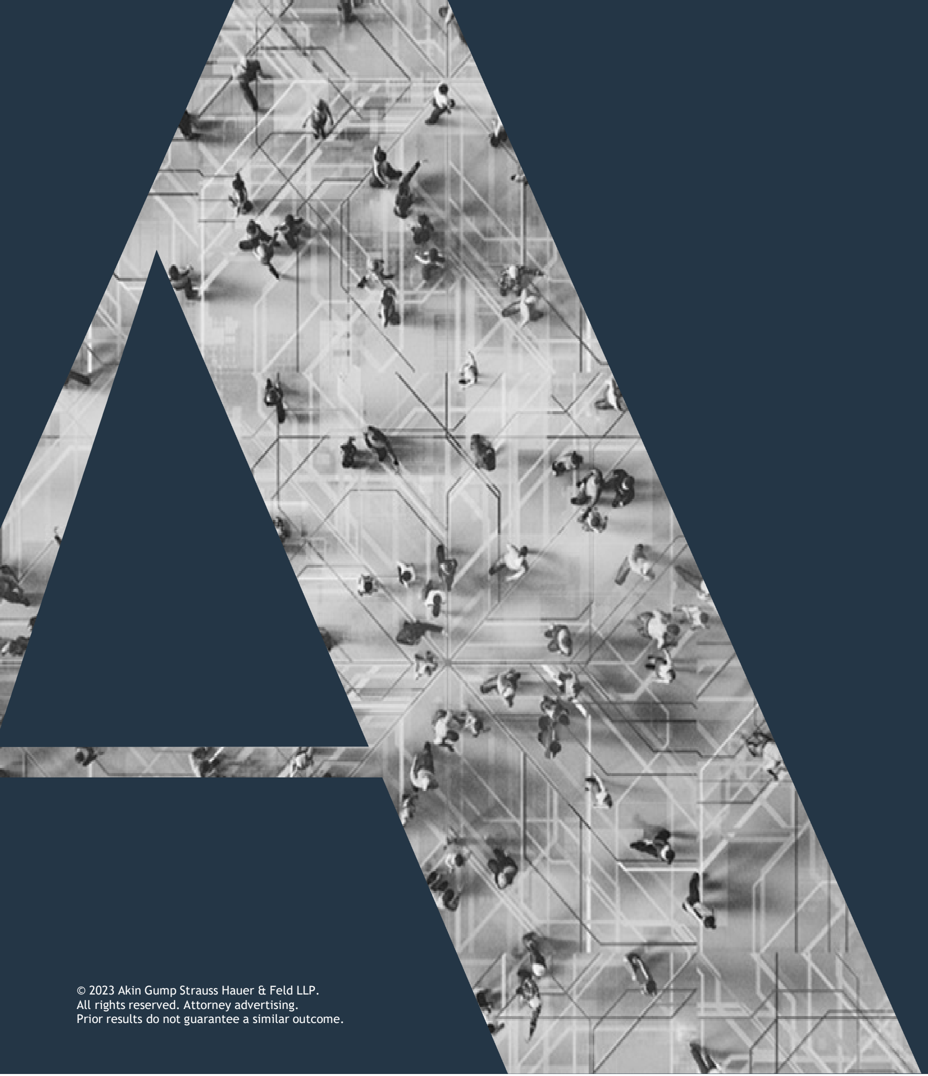


Deal Maker’s Boot Camp: Bankruptcy and Distressed M&A Transactions

November 16, 2023

Sara L. Brauner
Partner

sbrauner@akingump.com
New York
+1 212.872.7453

Nicholas Jay Houpt
Partner

nhoupt@akingump.com
Dallas
+1 214.969.4692

Akin℠

Learning Objectives

- Overview of in-court and out-of-court mergers and acquisitions (M&A) transactions for distressed assets
- Why distressed buyers typically prefer in-court deals
- Sale of equity
- Sale of assets

Bankruptcy and Distressed M&A

Out-of-Court Transactions

In-Court Transactions

Comparison: Out-of-Court vs. In-Court Transactions

Distressed M&A:
Out-of-Court Transactions

Out-of-Court Transactions

Two Forms: An out-of-court distressed M&A transaction can take one of two forms:

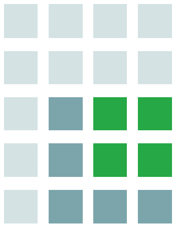
- **A sale of equity; or**
  - “turn over the keys”; or
  - Exchange offer.
- **A sale of assets.**

+ Advantages	- Disadvantages
• Less expensive. • Less time consuming. • <u>This assumes all goes as planned</u>.	• Carries risk, including litigation overhang. • May require third party cooperation. • Increased fraudulent transfer risk.

These risks and issues make out-of-court deals the less-preferred alternative to in-court transactions.

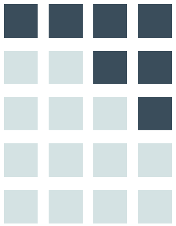
Sale of Equity vs. Sale of Assets

Sale of Equity



Acquiror buys equity directly from equityholders

Sale of Assets



Acquiror buys assets from the company

Sale of Equity

Sale of Equity			
Purpose	**Requires**	**Risk**	**Good for**
Typically a "**hand over of the keys**" from current equity to the seller's senior secured creditors.	Secured creditor takes equity of operating company subsidiaries by virtue of its pledge of such as collateral.	***"As is"*** -- Buyer/secured creditor takes the company "as is," with all liabilities, litigation, etc.	Private company targets.

- Most common form of out-of-court sales.
- If the company simply needed to delever its balance sheet, this is typically a viable strategy.
- If the company has operational issues or litigation overhang, this "as is" sale not attractive to a buyer.

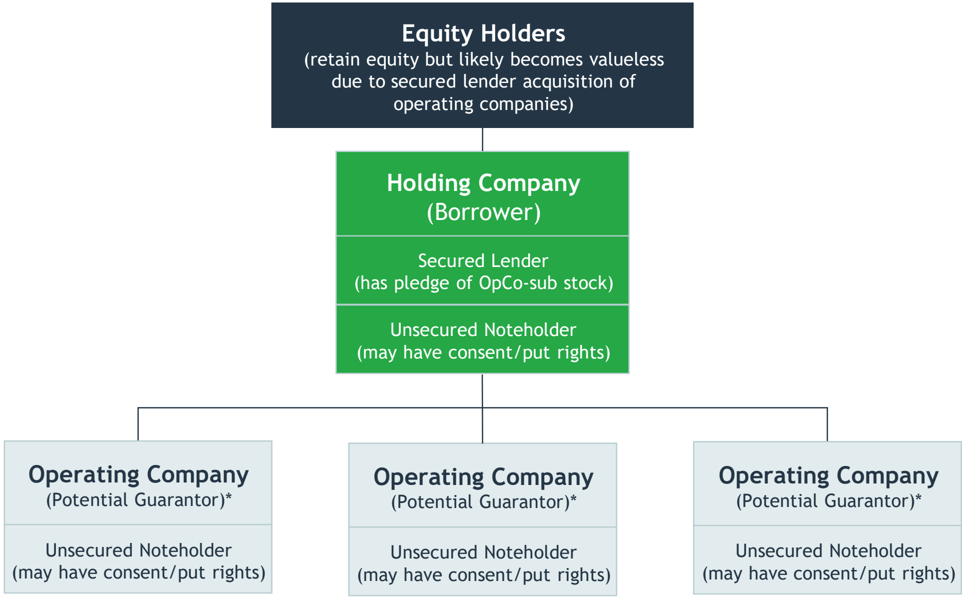
Sale of Equity — A Simple Example

Transaction

Lender displaces holding company borrower as stockholder of subsidiary operating companies and becomes owner of the business.

Likely Structure

Lender will likely insert a new Holdco (between old Holdco + operating companies).



** Guarantors of secured debt; may or may not be guarantors of unsecured debt; may have issued its own unsecured debt.*

The “As Is” Purchase and Effect on Stakeholders

Holdco Equity	Holdco Debt	Opco Lenders	Opco Noteholders	Exchange Offer
• Equity holders of Holdco retain equity, but it will have little to no value. • This makes sense because if secured creditors of the Holdco are agreeing to take equity for their debt, the current equity must be valueless.	• Debt holders of Holdco (e.g., mezz. Debt / unsecured debt) may get little or no value and may have to give consent to the transaction, depending on terms of indenture. • If secured creditors are agreeing to take equity for their debt, the unsecured or subordinated Holdco debt (like equity) presumably is valueless.	• May need to get lender consent if there are covenants against change of control in credit agreements applicable to subsidiaries. • This will depend on how “change of control” is defined in the credit agreements.	• May have “change of control put rights,” pursuant to which noteholders can force the company to buy back their bonds at a premium if there is a change of control of more than X% of the equity—typically 35%—or a change pursuant to which the equity sponsor no longer holds X%. • Like the “change of control covenant,” the drafting of this “put” right is very important.	• Buyer may offer sweeteners to debt holders to get them to waive default/put rights. • Typically, these exchange offers are coercive and designed to minimize holdouts.

Sale of Equity — Other Issues

Management

- Buyer must decide it will keep on management and employees.
- Often buyer retains management in order keep them on the buyer's side during the sale process.
- Particularly true if the "sale" triggered by an overleveraged balance sheet (and not operational issues).

Timing & Costs

- Usually less time consuming and costly than in-court sale because do not have to pay for third parties.
- Bidding procedures, auction and sale agreement don't need court approval.

Board Duties

- Seller's board has fiduciary duties.
- Must carefully consider potential sale transaction and value being received when company is insolvent.
- Board could face litigation from equity and debt holders unless transaction is consensual.

Litigation Risk

- Process is fraught with litigation risk for management and board.
- Possible litigation over:
  - Compliance with fiduciary; duties
  - Fraudulent conveyance; and
  - Destruction of value.
- Equity holder litigation/securities class action.

Sale of Assets — Transaction Structures

Sale of Assets

Purpose

- Typically results in a sale to 1-2 parties—the secured lenders or a third party.
- Buyer buys sellers' assets without taking equity (i.e., effectively "credit bids" for its collateral).
- May use assets for its own business (a strategic acquisition) or form a new entity.

Requires

- Buyer doesn't take liabilities (other than key contracts/vendors).

Risk

- **Level of risk makes this path very uncommon.**
- Fraudulent conveyance attack and successor liability.
- "Looting" the seller is an invitation for litigation, and a reason buyers want to pursue deals in court.
- Even if buyer is successful in defending against fraudulent conveyance litigation, any such litigation can take **years to conclude** and could result in **exorbitant costs**.
- This litigation is very fact-specific, and demonstrating solvency years in the past can be very time consuming, costly and result in a battle of the experts.

Good for

- Strategic acquisitions.
- In a perfect world, a distressed sale of equity or possibly assets out of court can be quicker and less expensive and leave the buyer with less liabilities/litigation overhang.
- The seller's board and the buyer more often will opt for **an in-court sale (blessed by the court).**

Distressed M&A: In-Court Transactions

In-Court Transactions

"Reorganization proceedings provide nothing more than a method by which the sale of an enterprise as a going concern may be made to the creditors themselves."

Thomas H. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L.J. 857, 893-95 (1981).

In-Court Transactions

Chapter 11 Can Be Viewed Essentially as an M&A Deal

- Chapter 11 is designed to **ensure that creditors get maximum value** on their claims.
- The company/chapter 11 debtor must use all of its value—including its equity—to satisfy such creditor claims.
- By default, all chapter 11 bankruptcy cases are effectively sales of equity and asset value, often by way of a plan of reorganization and/or sale of the enterprise as a going concern.

Plans & Sales

- In addition to simply proposing a plan of reorganization as a way to distribute value to their creditors, the Bankruptcy Code permits chapter 11 debtors to either sell assets or equity in chapter 11.

363 Sales

- When people discuss distressed sales, they're typically referring to asset sales pursuant to Bankruptcy Code section 363 (a "363 Sale").
- Section 363 Sales are the predominant form of distressed M&A transactions.

Sale of Assets

What is Section 363?

- Bankruptcy Code section 363(b) permits debtors to sell assets outside of the ordinary course of business.
- "The trustee [or debtor in possession] **after notice and a hearing**, may use, sell, or lease **other than in the ordinary course of business, property of the estate.**"

Most common type of distressed deal

What to Know?

- Court approval is key.
- A court ultimately blesses every part of the sale—the procedures, the process, the debtor's business judgment in entering into the sale transaction, the buyer's good faith, the sale of assets "free and clear," etc.
- Court approval results in the sale being cleanest from both the buyer's and the seller's perspective.
  - Even though it is potentially more costly and time consuming than an out-of-court transaction.
- Sale is done on notice to all parties in interest.
  - Parties will have an opportunity to object and be heard by the court.
- Potential problems with the sale and process are raised before the sale is consummated.
  - Can be addressed and hopefully resolved through negotiation.
  - Can be overruled by the court.

Sale of Assets — Why Do It?

The Five "F's"
Free and Clear
Fiduciary Duty
Finality
Faith
Freedom to Reject Contracts

Sale of Assets — Why Do It?

- The Five "F's"
- **Free and Clear**
- Fiduciary Duty
- Finality
- Faith
- Freedom to Reject Contracts

- Any court order approving a sale typically will include language making clear that the sale is "free and clear" of any liens, encumbrances, etc., which gives significant comfort to the buyer.
- **Bankruptcy Code section 363(f).** "The trustee may sell property under section (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –
  - (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.
  - (5) Such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

Sale of Assets — Why Do It?

- The Five "F's"
- Free and Clear
- **Fiduciary Duty**
- Finality
- Faith
- Freedom to Reject Contracts

- The seller's board will run a sale/marketing process that is pre-approved by the court after notice and a hearing. So long as the seller conducts itself in accordance with such procedures, its board should be protected in acting in accordance with its fiduciary duties to maximize value for its stakeholders.
- Given that the board is essentially a lame duck after the sale, this blessing is very important and board members will focus on it, sometimes to the chagrin of potential buyers.

Sale of Assets — Why Do It?

The Five "F's"

- Free and Clear
- Fiduciary Duty
- **Finality**
- Faith
- Freedom to Reject Contracts

Finality

- Any sale will require court approval (after notice and a hearing), meaning that, other than any appeals, the buyer and seller should not be subject to later litigation/second guessing.
- This is important because, out-of-court sales do carry potential litigation risk, including fraudulent conveyance risk.
- Court approval of the sale will be memorialized in a written sale order setting forth the various important protections of the sale including the "free and clear" language.

Sale of Assets — Why Do It?

- The Five "F's"
- Free and Clear
- Fiduciary Duty
- Finality
- **Faith (Good)**
- Freedom to Reject Contracts

- Sale orders typically include a provision finding the buyer is acting in "good faith" under Bankruptcy Code section 363(m).
- Section 363(m): "The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal."

Sale of Assets — Why Do It?

- The Five "F's"
- Free and Clear
- Fiduciary Duty
- Finality
- Faith
- **Freedom to Reject Contracts**

- Because the seller is in chapter 11, it can reject contracts it no longer wants (or that the buyer doesn't want when it buys the assets).
- The buyer should also be able to assume any of the debtor's contracts so long as (i) there is no Bankruptcy Code prohibition to doing so and (ii) the buyer can show adequate assurance of future performance (i.e., that it has the financial wherewithal to both pay any "cure" amounts and perform the contract on a go-forward basis).

Sale of Assets — Process

Maximizing Value

In order for a debtor to sell its assets pursuant to Bankruptcy Code section 363, it must show that such sale "maximizes value" for its stakeholders. Satisfaction of this condition can depend on timing of sale, consideration paid by buyer, assurance of consummation of Buyer, etc. In other words, **it does not always mean the price paid by the winning bidder in the auction process is the highest amount**.

Court Approval of Procedures

The best way to ensure that the debtor can make such a showing is to have the court **not only bless the final sale, but also pre-approve the process of marketing and selling the assets.** Therefore, a debtor will seek approval of its "bidding procedures" and auction process prior to undertaking such process.

Naked Auctions

If a debtor is commencing a process **without a "Stalking Horse" bidder** - a so called "naked auction" - the debtor will ask the court to bless the whole process, from marketing to possible selection of a stalking horse (including, potentially, pre-approval of a termination fee, expense reimbursement, bid protections, etc., to any potential stalking horse) to auction to sale hearing.

Stalking Horse

If debtor commences a sale process with a Stalking Horse, the debtor likely will ask the court to approve the Stalking Horse as the **"bid to bid against,"** and seek approval of the Stalking Horse's break-up fee, payment of expenses, and bid protections/approved procedures (which will have been previously negotiated with the "Stalking Horse").

i Obtaining court approval of these procedures helps to ensure that the ultimate sale order will contain the necessary provisions to provide comfort to the buyer and seller.

Sale of Equity — Plans and Plan Sponsors

What to Know

- Plan Sponsor Auction: Sometimes, companies in chapter 11 will propose a plan of reorganization that converts debt to equity, but will also permit parties to bid on such equity if they are willing to pay more for it than the estimated recovery for such debt converting to equity (i.e., based on the Debtors' stated enterprise value under the plan).

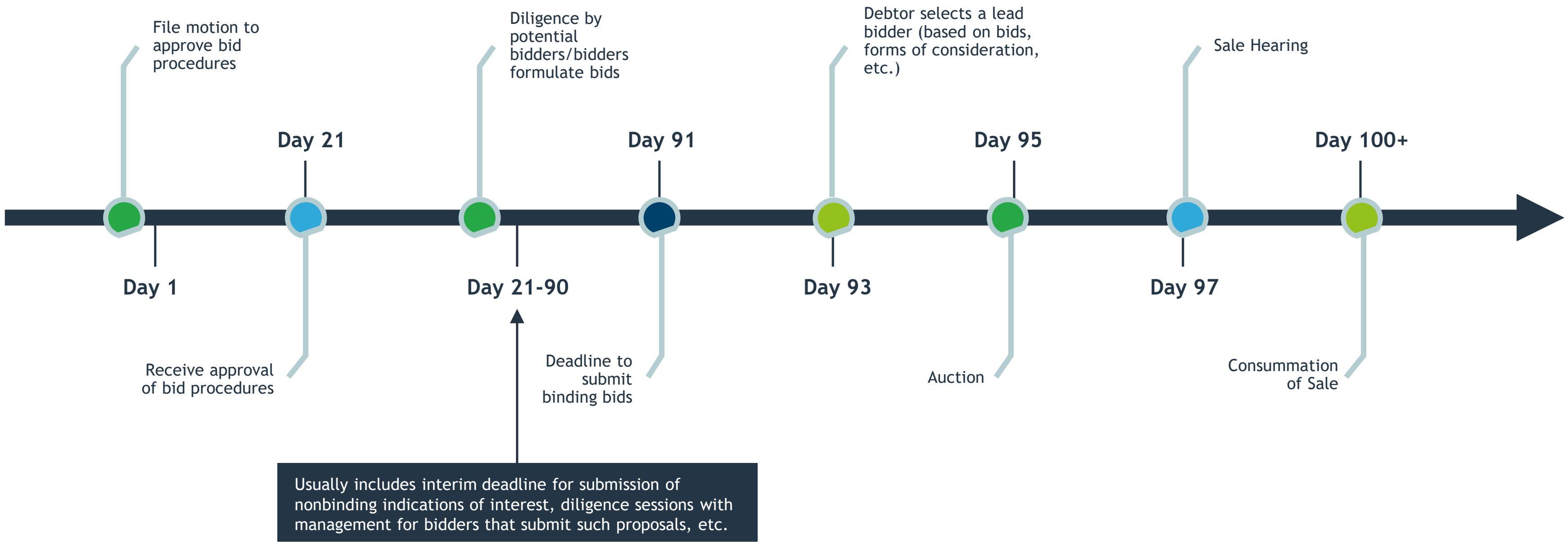
- If the debtor engages in a plan sponsor auction, it is usually on the same procedures used with regard to sales of assets and will require court approval.

- A debtor may pursue an equity/plan sponsor transaction and a sale process simultaneously with a "toggle" feature in a plan.

At some level, every plan of reorganization that envisions a "conversion" of debt to equity in the reorganized company is a "sale of equity" to the creditors.

Sample Timelines

Example 1: No stalking horse (bid procedures approved before marketing)



Sample Timelines

Example 2: Stalking horse (bid procedures approved after company negotiates stalking horse agreement)

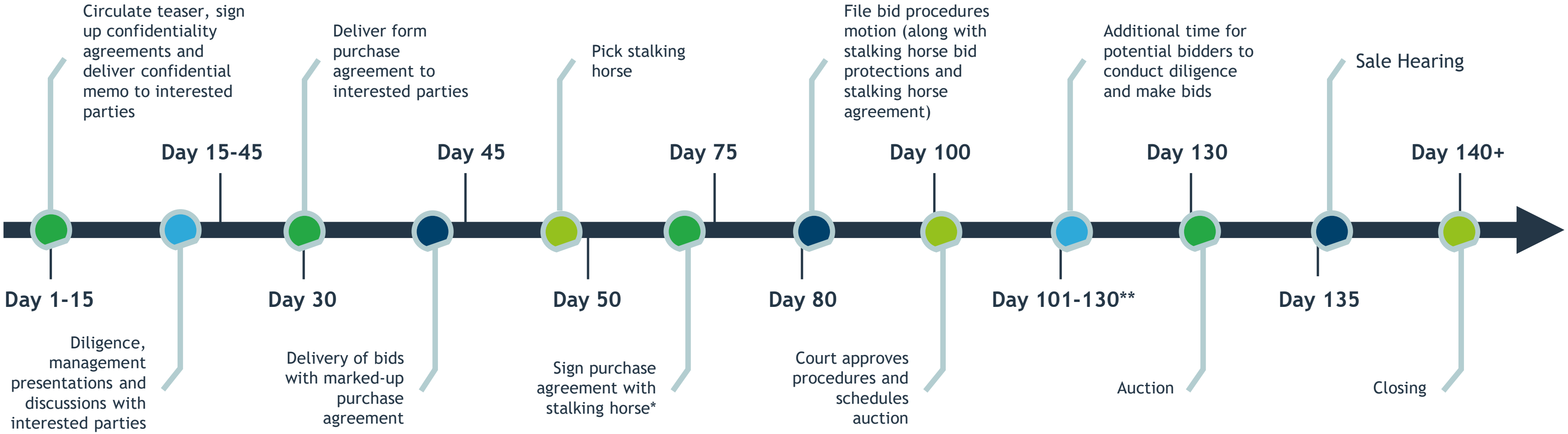
Usually this period is less than the period in a "Naked Auction" because stalking horse will not want process to go too long and such a shorter time period is defensible because presumably debtor has been in discussions with Stalking Horse for a period of time before).

- **Day 1** – Debtor files motion seeking approval of Stalking Horse bid, break-up fee, expense reimbursement and bid procedures
- **Day 21** – Receive approval of motion, including bid procedures and timing*
- **Day 21-60** – Diligence by potential competing bidders/ competing bidders formulate bids
- **Day 61** – Deadline to submit competing bids
- **Day 63** – Debtor selects a lead bidder
- **Day 65** – Auction
- **Day 67** – Sale Hearing
- **Day 70+** – Consummation of Sale

*The Debtor usually agrees to a no shop in the definitive agreement with the Stalking Horse until the bid procedures and buyer protections (break-up fee and expense reimbursement) are approved by the Court. **The length of this period may depend on the extent of any pre-bankruptcy marketing process as well as exigent circumstances that may compel a faster process (i.e., a "melting ice cube").

Sample Timelines

Example 3: Marketing run before court approval; seek court approval of bid procedures after stalking horse signed up



*Same no shop covenant will be included and effective until bid procedures and buyer protections are Court approved. **Same issues may require a faster process.

Key Bid Procedures Issues

- Break-up Fee to Stalking Horse Bidder
- Period of Time During Which Process Is Open to Other Bidders
- Forms of Consideration
- Consolidating Bids for Different Assets
- Qualifying Bidder Criteria
- Minimum Overbid
- Running the Auction
- Back-Up Bidders?
- Attendees at Auction/Too much Noise?
- Role of Official Creditors Committee
- What Constitutes "Highest and Best"?
- General "Fiduciary Duty/Fiduciary Out" for Debtors to Change Procedures

Credit Bidding Overview

What

- Secured creditor bids some amount of secured debt it holds in an auction to purchase such creditor's collateral.
- Amount (value) of bid is equal to the ***face amount*** of the debt that is bid, regardless of what the secured creditor paid for debt.
- Example: If creditor paid 50 cents on the dollar to own the debt, it still is permitted to bid the full par claim.

How

- At a sale under subsection (b) of Bankruptcy Code section 363(k) of ***property*** that is ***subject to a lien that secures an allowed claim***, unless the court, ***for cause***, orders otherwise, the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may ***offset*** such claim against the ***purchase price*** of such property.

Strategy

- Credit bidding is a strategy sometimes used by opportunistic "loan to own" lenders.
- Also often a defensive strategy to prevent below market value sales of a secured lender's collateral.
- Sometimes combined with a credit bidder being the debtor's chapter 11 DIP financing lender to ensure as much control of process as possible.

Credit Bidding — Recent Developments

- **Potential Pitfalls**. Over the last decade +, there has been a string of decisions that have challenged the ability to credit bid.
  - In the ***Philadelphia Newspapers*** case, in December 2009, the 3rd Circuit permitted the Debtors to **prohibit secured lenders from credit bidding** in the sale of their collateral under the Debtors' plan of reorganization.
  - The Court stated in footnote 14:
    - The Lenders argue that the "for cause" exemption under Bankruptcy Code section 363(k) is limited to situations in which a secured creditor has engaged in inequitable conduct. That argument has no basis in the statute. A Court may deny a lender the right to credit bid in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to foster a competitive bidding environment. *See, e.g.*, 3 Collier on Bankruptcy 363.09[1] ("the Court might [deny credit bidding] if permitting the lienholder to bid would chill the bidding process.")
    - Three years later, in May 2012, the United States Supreme Court—in a unanimous one-page decision in ***RadLAX Gateway Hotel v. Amalgamated Bank***—rejected the holding in the ***Philly News*** case and reaffirmed the ability of secured creditors to credit bid in the sale of their collateral pursuant to a plan under Bankruptcy Code section 363(k), but the dicta in footnote 14 of the 3rd Circuit's decision went undisturbed.

Credit Bidding — Recent Developments

- In the ***Fisker Automotive*** case, in January 2014, the Delaware Bankruptcy Court ruled that a secured creditor holding a $168.5 million claim could credit bid only $25 million of the claim.
- **Holding:** Citing footnote 14 in the 3rd Circuit's *Philly News* decision, the Bankruptcy Court concluded that secured creditors do not have an absolute right to credit bid in the sale of their collateral and found "cause" to limit the ability of the secured creditor to credit bid its claim only up to the amount of its purchase price for the claim ($25 million). The Court cited to several aggressive actions the secured creditor had taken before and during the case but concluded that the chilling effect on the sale process that the Court said would result from the proposed credit bid was a sufficient rationale for its decision.
- **Facts:** Fisker Automotive sought to become a manufacturer of plug-in hybrid electric vehicles in the United States. The debt that the secured creditor—Hybrid—proposed to credit bid was a $168.5 million loan to Fisker from the U.S. Department of Energy (DOE). Hybrid acquired the DOE debt through an auction process in which a Fisker director took a lead role. After Hybrid's acquisition of the DOE debt, the director immediately resigned from the Fisker board and became Hybrid's lead person in connection with Fisker. Hybrid "convinced" Fisker that they should sell their assets to Hybrid for a $75 million credit bid but without an auction or any opportunity for third parties to outbid Hybrid. Hybrid also insisted that the sale be concluded on a very fast schedule spanning the year-end holidays—the chapter 11 cases were filed on November 22, 2013, and Hybrid insisted that a sale hearing occur by January 3, 2014, but without any rationale for the speedy process. The Court called the timing "troublesome" and stated that Hybrid's "rush to purchase and persist in such effort [was] inconsistent with the notions of fairness in the bankruptcy process" and concluded not to allow Hybrid to "short-circuit" the bankruptcy process. The Court was troubled that the validity of Hybrid's secured claim had not been confirmed. The Court also was advised by the official creditors committee that another bidder, Wanxiang America Corp, would be prepared to bid against Hybrid in an auction but only if Hybrid was not allowed to credit bid its full claim.
- **Key Takeaway:** It's debatable whether the Court in Fisker would have come to the same result had Hybrid acted in a less aggressive manner. The Fisker decision should perhaps be viewed more as a warning to future secured creditors seeking to credit bid acquired debt rather than as a basis to limit credit bidding solely to ensure a "successful" auction but it certainly reinvigorated the debate about credit bidding following the Supreme Court's RadLAX decision.

Credit Bidding — Recent Developments

- In the ***Free Lance-Star*** case (decided four months after *Fisker*), the Bankruptcy Court for the Eastern District of Virginia similarly decided to limit the amount of a secured claim purchased by a lender that could be credit bid on the basis of facts even more troubling than in *Fisker*.
- **Holding:** "Cause" to limit the amount a secured creditor may credit bid under Section 363(k) existed as a result of the secured creditor's "overly zealous loan-to-own strategy" and the "negative impact" the secured creditor's "misconduct" had on the auction process.
- **Facts:** As in *Fisker*, a purportedly secured creditor acquired pre-existing bank debt incurred by the Free Lance-Star Publishing Co., which operated a printing and newspaper business as well as four radio stations, including three parcels of real property with broadcast towers erected on each parcel (the "Tower Assets"). Pre-bankruptcy, Free Lance-Star borrowed approximately $50 million from BB&T secured by real and personal property but not including the Tower Assets. Free Lance-Star used the loan proceeds to build a state-of-the-art printing facility. During 2009, Free Lance-Star breached various financial covenants under the BB&T loan and, although there were no payment defaults, Free Lance-Star could not cure the covenant defaults or refinance the loan. In June 2013, BB&T sold the loan to Sandton Capital, which established an entity called DSP to negotiate a resolution of the BB&T debt with Free Lance-Star. DSP pushed Free Lance-Star to file a chapter 11 bankruptcy case and sell its assets to DSP under Section 363(b). DSP also pushed Free Lance-Star to pledge the Tower Assets as collateral for the debt. Discussions stopped and DSP filed UCC fixture filings against the Tower Assets without the knowledge of Free Lance-Star. 90 days later, DSP renewed its pressure on Free Lance-Star to file for bankruptcy and sell its assets to DSP in a speedy process of no more than six weeks from chapter 11 filing to closing. Free Lance-Star's financial adviser proposed to distribute marketing materials regarding a possible asset sale and DSP insisted that they include a bold statement on the front page that DSP had a right to a $39 million credit bid. Free Lance-Star's financial adviser determined that the company had adequate cash flow to proceed with the bankruptcy case without a DIP loan but DSP pushed Free Lance-Star to accept a DIP loan funded by DSP and secured, among other things, by the Tower Assets. Free Lance-Star refused and then DSP withdrew its support for the bankruptcy filing. DSP then recorded additional UCC financing statements against the Tower Assets without notice. Free Lance-Star commenced its chapter 11 case in late January 2014 without DSP's support but with separate motions to sell the Tower Assets and the rest of its business assets.

Credit Bidding — Recent Developments

- ***Free Lance-Star* Facts (Continued)**
- Although the Court approved bid procedures for the sale of both sets of assets, only the bid procedures not covering the Tower Assets permitted DSP to credit bid. DSP objected to the use of its cash collateral and asked the Court to grant new liens on the Tower Assets as adequate protection but without disclosing that it had recorded financing statements against the Tower Assets in September 2013 and January 2014. The Court declined to grant the additional liens. DSP then filed a complaint seeking a declaration that it had valid liens against all of Free Lane-Star's assets including the Tower Assets and the parties filed cross motions for summary judgment. At the hearing, DSP did not introduce any evidence to refute allegations by Free Lance-Star that DSP's conduct had been inequitable. The Court denied DSP's summary judgment motion, declined to find that DSP had liens on the Tower Assets, granted partial summary judgment in favor of Free Lance-Star and ruled that, due to DSP's inequitable conduct, it would cap the amount of debt DSP could credit bid at $1.2 million on the radio business and $12.7 million on the newspaper and printing business in order to foster a robust auction for all of Free Lance-Star's assets.
- **Key Takeaway:** The decision includes scathing commentary from the Court directed at DSP's conduct (the Court was "troubled", "disappointed" and "quite concerned" by DSP's actions) and DSP chose not to present evidence contradicting testimony that the sale process had been compromised by DSP and that its credit bid rights had to be capped to restore a competitive bidding environment. Like *Fisker*, the *Free Lance-Star* decision stands for the proposition that excessive and inappropriate conduct can constitute "cause" to limit a credit bid under Bankruptcy Code section 363(k). In future situations, parties undoubtedly will cite to Free Lance-Star as a basis to limit credit bidding to ensure a "robust" auction. Whether Courts will agree only on the basis of conduct as over-the-top as DSP's will be the real question.

Credit Bidding — Recent Developments

- The recent decision in ***Aeropostale*** in the Bankruptcy Court for the Southern District of New York reverses the recent trend set by *Fisker* and Free-Lance Star, and affirmed a secured lender's right to credit bid pursuant to Bankruptcy Code section 363(k).
- In the *Aeropostale* case, the Debtors sought to limit the ability of the secured lenders to credit bid, asserting that (1) the secured lenders' claims should be equitably subordinated under Bankruptcy Code section 510(c), (2) the lenders' claims should be recharacterized as equity and (3) the lenders' right to credit bid should be limited based on such lenders' inequitable conduct.
- Specifically, the Debtors asserted that the lenders had, among other things, (x) breached a sourcing agreement with the Debtors and sought to impose unreasonable new terms, (y) engaged in a conspiracy to push the Debtors into bankruptcy to acquire the company "on the cheap" and (z) traded in the Debtors' stock while in possession of material nonpublic information.
- The bases on which the Debtors sought to disqualify the secured lenders from credit bidding require satisfaction of very high standards and burdens of proof, demonstrating truly bad conduct. The Debtors could not meet that burden in the *Aeropostale* case and the Court denied the Debtors' request to prevent the lenders from credit bidding.

Credit Bidding — Conclusions

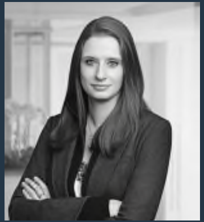
- You can't credit bid for what isn't your collateral.
- Avoid acting in bad faith or trying to rush or compromise the sale process.
- Expect efforts in future cases to limit credit bidding based on arguments that conduct in those cases was as egregious as *Fisker* and *Free Lance-Star* and to foster a robust auction.

Comparison: Out-of-Court vs. In-Court Transactions

Out-of-Court vs. In-Court Transactions

	Out-of-Court	In-Court
Free & Clear	✗	✓
Debt Obligations Remain With the Buyer	✓ (in equity stake)	✗
Ability to Reject Contracts	✗	✓
Costs	Less, if no litigation	More (not just due to more time, but presence of more constituents, i.e., the UCC), but get certainty.
Time	Less, if no litigation	More, but get certainty (and courts discourage speed, especially in credit bid context).
Pending Litigation	Continues (in equity sale)	Not purchased.
Board Duty/Board Risk	Fiduciary Duty When Insolvent; Board faces litigation risk	Highest and best/maximize value for all stakeholders; Board protected by virtue of Court Order.
Credit Bid	Hand-over/Fraudulent Conveyance Risk	Recent decisions are problematic/need to play game the right way.

Questions?

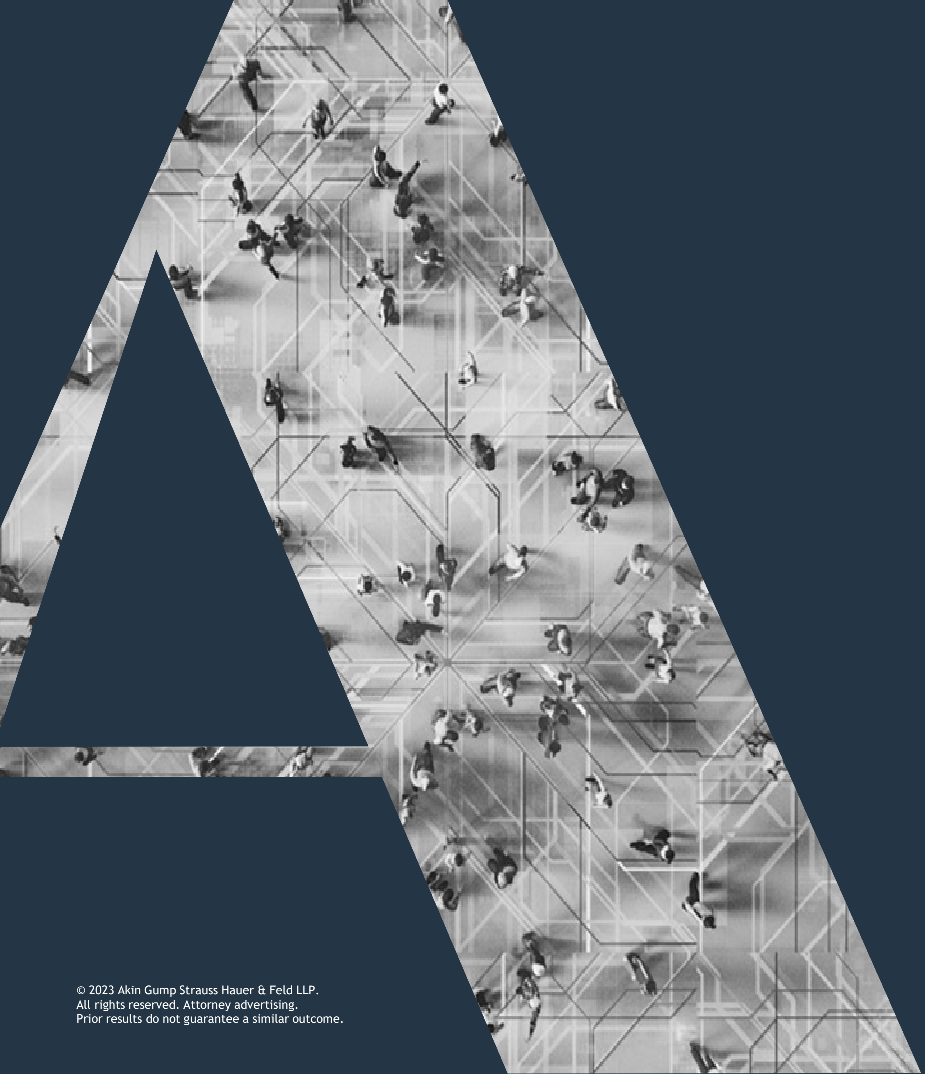


Sara L. Brauner
Partner

sbrauner@akingump.com
New York
+1 212.872.7453

Nicholas Jay Houpt
Partner

nhoupt@akingump.com
Dallas
+1 214.969.4692



Thank You!