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Finding Opportunity in Distressed Circumstances

Q: DO OPPORTUNITIES EXIST FOR ASSET BUYERS IN TIMES OF DISTRESS?

A: Yes, valuable assets may be for sale at affordable prices in times of distress for two reasons. First, a primary means of raising liquidity for cash-starved businesses is through the disposition of assets. In those situations where a company’s liquidity has evaporated, a sale of assets is sure to follow as a primary means of attempting to satisfy creditor claims with some cash distribution from the proceeds of a sale. Second, when such assets are marketed, there is little expectation that a “going concern” value will be achieved. Rather, because time is money in insolvency proceedings, a relatively rapid sale process may yield only a liquidation value for the assets – not good for creditors but certainly good for buyers.

Q: WHAT TYPES OF ASSETS ARE AVAILABLE IN DISTRESSED SALES?

A: Any type, including IP assets, financial assets, manufacturing assets, and real estate assets, to name just a few examples. A company with liquidity challenges may sell only a subset of its assets or it may be forced to sell substantially all of its assets. A fiduciary conducting the sale is charged with running a process geared towards realizing the highest overall value, so if dividing the assets into lots will bring the highest value, then that option will be implemented.

Q: COULD YOU OUTLINE THE PROCESS FOR BUYING ASSETS IN DISTRESSED SALES?

A: The specific process will vary depending upon the circumstances. When a secured lender is exercising collateral disposition rights outside of court, Article 9 of the Uniform Commercial Code will apply. When a bankruptcy trustee (or debtor in possession) is selling assets, Section 363 and applicable bankruptcy rules will apply. Generally, that process allows an initial bidder (the “stalking horse”) the opportunity of negotiating an asset purchase agreement which will be subject to higher and better bids after an auction process and bankruptcy court approval. A sale by an assignee for the benefit of creditors may follow a similar path but lack any judicial supervision in jurisdictions where an assignment process is conducted completely out of court. If aware of a situation early enough, an interested buyer may have the ability to influence the process that will apply to the sale.

Q: ARE THERE ANY BENEFITS TO BUYING ASSETS AT DISTRESS?

A: Speed and price are two major benefits. In addition, buying at some types of sales, such as a sale conducted pursuant to Section 363 of the Bankruptcy Code, is a judicially supervised process resulting in a final sale order containing certain factual findings and determinations that the buyer is not responsible for various obligations or liabilities of the distressed seller. A buyer at a distressed sale can also seek to obtain bidding protections in the form of a break-up fee and expense reimbursement in certain circumstances. When purchasing at a Section 363 sale, a court will typically waive the appeal period, allowing the sale to be closed immediately.

Q: WHAT ARE SOME OF THE CHALLENGES AT BUYING ASSETS AT DISTRESS?

A: There are many parties affected by a distressed business: secured creditors, unsecured creditors, equipment lessors, investors, employees, landlords, and others. In formal bankruptcy cases, a federal bankruptcy judge presides over the proceedings and a government watchdog from the U.S. Department of Justice will also be entitled to appear and be heard on any issue. Thus, a successful purchase depends not just on negotiating a two-party transaction, but rather navigating the applicable process and dealing with all the competing interests successfully to allow a bid to succeed and closing to occur.



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