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THE ROLE OF THE COMMITTEE IN 363 SALES

The statutory creditors' committee, the authors argue, has an important role to play in Section 363 sales to protect the interests of unsecured creditors, particularly when the prospective buyer is also a DIP lender. The authors discuss important issues for the committee in three phases: protections provided the DIP lender in the financing phase; bid protections in the sale process; and concerns in the sale and purchase agreement phase.

By Mark S. Indelicato and Alison M. Ladd *

Section 363 of the Bankruptcy Code authorizes a debtor, "after notice and a hearing, [to] sell, or lease, other than in the ordinary course of business, property of the estate…."[1] Chapter 11 debtors have increasingly utilized Section 363 to pursue rapid sales of all or substantially all of their assets early in the chapter 11 cases, outside of a traditional plan process. Thus, statutory creditors' committees (the "Committee") must play an active role in Section 363 asset sales to protect the interests of unsecured creditors who do not have the same statutory protections in a Section 363 sale that are afforded to such creditors in a chapter 11 plan process and are often at a disadvantage to other constituents in the case, such as the debtor's secured lender(s).

The typical challenges faced by the Committee in a Section 363 sale are significantly compounded when the proposed purchaser of the debtor's assets ("Stalking Horse Bidder") is also providing the debtor-in-possession financing ("DIP Financing") — whether it be a pre-petition lender who plans to credit bid for the debtor's assets, or a third-party purchaser who intends to provide DIP Financing to stabilize the debtor's operations through consummation of the sale. In these instances, the protections provided to the proposed debtor-in-possession lender ("DIP Lender") pursuant to the terms of the DIP Financing order ("DIP Order") are designed not only to provide benefits as a DIP Lender, but to also provide benefits as purchaser (*e.g.*, cross-default provisions, abbreviated sale timeline, generous fees, and expense reimbursement provisions, etc.). As a result, when the DIP Lender is also the Stalking Horse Bidder, the intersection of the DIP Order and order approving the bidding procedures for the debtor's assets ("Bid Procedures Order") can present unique challenges for both the Committee and the court.

For example, a third-party DIP Lender that seeks truncated sale milestones in the DIP Order to expedite payoff of the DIP Financing is often problematic for the Committee, given that an extended sale process is generally more likely to bring additional purchasers to the table. However, when the DIP Lender is also the Stalking Horse Bidder, the rapid sale timeline set forth in the DIP Order backs the Committee into a corner, and gives the DIP Lender/Stalking Horse Bidder unreasonable control over the entire sale process and the ability to limit or even eliminate competitive bidding. While there is no simple solution to this issue and the numerous others that arise when the DIP Lender is also the Stalking Horse Bidder, the over-arching

[1] 11 U.S.C. § 363(b)(1).

* *MARK S. INDELICATO is a partner and ALISON M. LADD is an associate at Hahn & Hessen LLP, New York. Their e-mail addresses are mindelicato@hahnhessen.com and aladd@hahnhessen.com.*

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