Primer on Distressed M&A: 363 Asset Sales

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Transaction Structures
Distressed acquisitions can be conducted both in or out of court.

Typical structures:
- Negotiated out-of-court sale or acquisition
- 363 sales
- Chapter 11 plan of reorganization
- Buying a control position/”loan to own”
- Other transaction structures
Structuring an Out-of-Court Transaction

• Acquisition of a distressed company can be structured as any other transaction, but they are typically structured as asset acquisitions where all liabilities that are not specifically assumed are left with seller
  – Assets to be assumed are specifically enumerated
  – Purchase Agreement provides for indemnification for specifically excluded liabilities
  – Due diligence is key in assessing and pricing risk

• The goal is to leave behind many of the liabilities that resulted in the company becoming distressed
  – Some liabilities (e.g., environmental, multiemployer pension) pose special challenges
  – Inability to assign contracts without consent, no “free and clear” sale order, no court oversight
Risks of a Distressed Transaction Without Chapter 11

• Fraudulent conveyance or transfer claims
  – Actual fraud/Intentional fraudulent conveyance: A transfer made prior to a bankruptcy filing with “the actual intent to hinder, delay or defraud” any entities that were or became creditors of the debtor
  – Constructive fraudulent conveyance: The debtor received less than “reasonably equivalent value” in exchange for the transfer, and the debtor was insolvent
  – The Bankruptcy Code allows a bankruptcy trustee to recover assets that were fraudulently transferred if within the relevant time frame prior to the bankruptcy filing (two years)
Risks of a Distressed Transaction Without Chapter 11 (cont'd)

• Fiduciary Duties
  – Although fiduciary duties are always owed to the corporation (i.e., to maximize the value of the corporation), when a corporation is insolvent (in DE) or is in or approaching a zone of insolvency (in other jurisdictions), certain creditors may be able to assert derivative claims on behalf of the corporation (i.e., obtain "standing") for breach of those duties

• Due diligence complications if seller is attempting to hide or minimize problems

• Seller may seek bankruptcy protection after a purchase agreement has been signed
Advantages/Disadvantages of Out-of-Court Structure

• Pros:
  – Usually the fastest and cheapest option
  – Avoid potential negative effects of a bankruptcy on seller’s relationships with customers, suppliers and employees

• Cons:
  – Does not convey assets “free and clear” by a court order
  – No ability to bind non-consenting creditors
  – No ability to remedy agreements that are in default
  – No ability to override anti-assignment clauses in leases, licenses and contracts
  – No assurance that the transaction will keep the target out of bankruptcy court
  – Risk of successor liability and fraudulent conveyance claims
Advantages/Disadvantages of In-Court Structure

- **Pros:**
  - Able to execute plan of reorganization with less than unanimous consent of parties in interest (2/3 in amount and 1/2 in numerosity for debt; 2/3 in amount of equity); only need one accepting impaired class
  - Can execute 363 sale with showing of appropriate exercise of sound business judgment, sufficient marketing process under the circumstances and sale in best interests of estate
  - Purchase free and clear of most liabilities (including legacy liabilities) and burdensome contracts
  - Debtor can assign most contracts and leases without contractually required consent of counterparty

- **Cons:**
  - Expense and delay from process including “hold-up” tactics
  - Additional oversight by Court, U.S. Trustee, and potential creditors’ committee
  - Potential adverse impact of publicity and disruption due to bankruptcy
  - More difficult to obtain exclusivity
Overview of Section 363
Types of Chapter 11 Sales

• Two methods of implementing Chapter 11 asset sales
  – Plan of reorganization
  – Auction process under Section 363 of the Bankruptcy Code

• Plan of reorganization
  – Lengthier and more expensive process (requires a disclosure statement, voting, satisfaction of plan confirmation requirements)
  – Mitigates risk of competing purchaser
  – Free and clear plus ability to obtain broader third party releases
  – No transfer taxes in connection with sale
Types of Chapter 11 Sales (cont’d)

• Auction process
  – Quicker and less onerous than a plan sale
  – Increased risk of competing purchaser with “higher or better bid”
  – Free and clear plus releases limited to debtor
  – Transfer taxes apply to sale
Section 363 Asset Sales Overview

• Section 363 of the Bankruptcy Code allows a debtor to sell property of the bankruptcy estate outside the ordinary course of business
  – Assets may be sold free and clear of liens, claims, and encumbrances
  – A section 363 sale offers a purchaser an opportunity to acquire assets with an exceptionally clean title (supported by a bankruptcy court order)

• Chapter 11 debtors often sell all or part of their assets pursuant to section 363
  – Asset sales may also take place under a chapter 11 plan, but are more often accomplished through separate, section 363 sale processes because such processes are generally simpler, shorter, and do not require creditor solicitation or voting

• Debtors often sell all or substantially all of their assets as going-concern businesses
Section 363 Sale Standards and Requirements

- The debtor-in-possession ("DIP") must demonstrate that the proposed sale is a result of sound business judgment and is in best interests of estate.
- A debtor must demonstrate that a good business purpose necessitates the sale outside of a bankruptcy plan and may be required to show cause based on, among other things, exigent circumstances or depreciating asset value. See Comm. of Equity Sec. Holders v. Lionel Corp., 722 F.2d 1063 (2d Cir. 1983) (reversing approval of sale where debtors failed to show "good business reason" for sale).
  - In practice, courts generally permit debtors to sell their businesses under section 363. Today, Lionel stands for the notion that courts generally defer to a debtor's business judgment regarding section 363 sales.
- Adequate and reasonable notice to all interested parties.
- Good faith purchaser.
- Fair and reasonable sale price.
Section 363 Sale Process: Basic Steps

- A 363 sale process is typically a 2-step process with **phase 1** involving marketing, due diligence, and determination of the stalking horse bidder and **phase 2** likely involving an auction and determination of the highest bidder. Parties to the sale must receive court approval of phase 1 (and the overall sale process) before moving on to phase 2

  **Phase 1:**
  - Marketing and due diligence:
    - As in any other sale, the DIP first markets its assets to potential purchasers
    - Much of the actual due diligence, marketing and identification of the stalking hose may take place before a 363 sale motion can be filed
    - Unique considerations to diligence
Section 363 Sale Process: *Basic Steps* (cont’d)

- **Phase 1 (continued):**
  - Stalking horse bidder:
    - Debtor works with a potential purchaser as a stalking horse, whose bid serves as the floor for all other bids and offers.
    - If there is no stalking horse bidder (i.e., in a “naked” 363 transaction), the seller usually provides a form of asset purchase agreement that any qualified bidder must mark up as part of its bid.
  - Asset purchase agreement:
    - Debtor executes an asset purchase agreement with the stalking horse bidder.
    - The terms of this purchase agreement set the minimum floor for the price for the assets and the structure of the transaction.
    - The stalking horse bidder provides a cash deposit (generally 10%).
• Phase 1 (continued):
  – Bid procedures and protections:
    • Debtor files a motion to approve bidding procedures, which may be heard on an expedited basis, that often include bidding protection procedures sought by purchasers
    • The bid procedures are just that – procedures that are followed when the assets are auctioned in court. They set the schedule for submitting an offer and/or objections to the sale and the date, time and location of the public auction, the amount of any required deposit, and the documents any potential bidder must submit to become a “qualified bidder” entitled to participate in the auction. They also approve any break up fee or expense reimbursement to be paid to the stalking horse bidder
Section 363 Sale Process: Basic Steps (cont'd)

- **Phase 2:**
  - Bid submissions: Potential purchasers submit their bids pursuant to the bidding procedures order, which sets forth the minimum standards for qualified bids and other related issues.
  - Auction:
    - Auction is usually held where the debtor selects the highest and best bid.
    - If there are no qualified bids submitted prior to the auction, then the auction is cancelled and the staking horse bidder becomes the successful bidder.
  - Bankruptcy court approval: The transaction usually closes shortly after approval by the bankruptcy court, subject to the court's waiver of 14-day stay period required under law.
Section 363 Sale Process: Sale Order

- A sale order approves and authorizes the sale of assets and may provide for a number of sale-related issues, including, among other things:
  - free and clear nature of sale (often including reference to any specific liabilities of particular concern); release of claims against purchaser;
  - distribution or use of proceeds (including, in some cases, immediate payment of DIP or secured debt obligations and/or break-up fee and expense reimbursement for any outbid stalking horse bidder); and
  - contract and lease assumption and assignment issues (including procedures regarding "held" or "designated" contracts)

- A sale order is typically heavily negotiated among the debtors, the purchaser, secured creditors, any official committee(s), and any other significant party in interest after the auction results are determined and before the sale hearing

- Under section 363, a successful bidder acting in good faith may close at any time after a sale order is entered. In some cases, however, a bidder may want to wait until a sale order becomes final (absent appeal, fourteen days after entry)
Section 363 Sale Process: Typical Timeline

- Generally, the total time from commencement of preparations through approval of a 363 sale may range from 75 to 150 days subject to, among other things, the level of creditor consensus
  - Courts and creditors often prefer longer timelines in order to ensure sufficient time for a debtor to market the assets to be sold
  - Shorter timelines are often approved where debtors are able to show that asset values may deteriorate in bankruptcy and/or where a stalking horse bid is conditioned on a quick sale process

Typical Section 363 Sale Timeline

- Market Assets
- Negotiate and prepare asset purchase agreement
- Prepare motion, bidding procedures order and sale order
- Motion Filing Date: Day 25
- Bidding Procedures Hearing
- Due diligence period for competing bidders: Day 45
- Bid deadline and Auction
- Sale Hearing: Day 46-130
- 30-90 days
Determining to Pursue a Section 363 Sale: Benefits (Seller’s Perspective)

- **An Expedited Process**
  - A traditional chapter 11 plan process (including a sale under a chapter 11 plan) involves longer notice periods and requires approval of a disclosure statement and creditor voting. Even a prepackaged or prearranged plan normally takes significantly longer than a section 363 sale.
  - A plan confirmation process can become bogged down in negotiations over "side-show" issues with a variety of stakeholders. In contrast, a section 363 sale usually focuses "big-picture" issues—e.g., is it within a debtor's sound exercise of its business judgment to sell the asset, and did the debtor obtain a fair price?
  - A section 363 sale allows a purchaser to acquire a business without investing its way into a debtor's capital structure (e.g., as in a loan-to-own transaction) or being forced into plan negotiations with a debtor's entire creditor body (though significant parties in interest, including senior lenders and any official committees, may play large roles in a section 363 sale process).
Determining to Pursue a Section 363 Sale: Benefits (Seller’s Perspective) (cont’d)

• The Ability to Exclude Even Non-Dischargeable Liabilities
  – A section 363 sale may be structured to exclude or "leave behind" most liabilities, including even certain obligations that may not be discharged under a chapter 11 plan
  – If a debtor's business is burdened by such liabilities (including, e.g., certain pension and tax obligations and fraud-based litigation claims), a chapter 11 reorganization may not present a viable restructuring alternative

• Sale of Assets “As Is”
  – Because the buyer will take the assets free and clear, the seller can take the position that they are being sold "as is" and provide limited representations and warranties that will not survive closing
Determining to Pursue a Section 363 Acquisition: Benefits (Buyer’s Perspective)

- **Protections Provided under Sale Order**
  - Assets are sold free and clear of liens
  - Determination by bankruptcy court that consideration was fair and reasonable, which should bar fraudulent conveyance and transfer claims and should ensure the enforceability of the purchase documents

- **Ability to “Cherry Pick” Assets**
  - Buyer may have the ability to pick and choose assets and liabilities with more latitude than would be typical outside of bankruptcy

- **Flexibility in Assuming Contracts**
  - Buyer will have great flexibility in assuming contracts related to the assets being purchased. As a general rule, section 365 of the Bankruptcy Code permits a debtor to assume and assign its executory contracts as it sees fit and provides the buyer with enhanced leverage in dealing with contract counterparties, who may be willing to make compromises in order to avoid having their contracts rejected
Determining to Pursue a Section 363 Acquisition: Benefits (Buyer’s Perspective) (cont’d)

• HSR Waiting Period
  – The waiting period under the Hart-Scott-Rodino Antitrust Improvements Action of 1976, as amended, is shortened to 15 days under section 363(b)(2)(B) of the Bankruptcy Code

• Exemption from Registration of Securities
  – Section 1145 of the Bankruptcy Code may in limited circumstances provide an exemption from the registration requirements of the Securities Act of 1933, as amended, for the issuance of securities by buyer in payment of purchase price
Determining to Pursue a Section 363 Sale: Drawbacks

- **Limited Control of the Process**
  - Because it ordinarily requires a public marketing and auction process, a section 363 sale deprives the debtor and stalking horse purchaser of a level of control enjoyed in other contexts (although parties may similarly lose a degree of control over a chapter 11 plan process involving a public auction)
  - Because a debtor must show that a section 363 sale represents the highest or otherwise best offer for its assets, another, outside bidder can outbid the stalking horse, drive up the price, or force parties to alter the initial deal

- **Not a Comprehensive Reorganization**
  - Consummating a section 363 sale does not complete a debtor's restructuring process and ordinarily must be followed by a chapter 11 plan that reorganizes remaining, unsold assets or liquidates the debtor's estate (including any sale proceeds)
Determining to Pursue a Section 363 Sale: Drawbacks (cont’d)

• **Limited Flexibility**
  – A section 363 sale is normally structured as a simple asset sale and may limit a prospective purchaser’s flexibility (although section 363 sales have become more creative and may incorporate provisions offering increased flexibility either in connection with a sale or after the closing)

• **Loss of Favorable Tax Treatment**
  – As mentioned above, net operating losses and other favorable tax attributes ordinarily may not be transferred to a purchaser in a section 363 sale, and a section 363 sale may not be exempt from certain transfer taxes
Documenting the Sale: *Preliminary Agreements*

- **Confidentiality Agreements**
  - Any potential bidder should avoid blanket restrictions on disclosure of existence of discussions or the terms of the proposed transaction to preserve their ability to promote their transactions to the seller’s creditors and collaborate with other bidders.

- **Standstill Agreements**
  - Sellers should seek standstill agreements that will prohibit potential bidders from purchasing claims against the seller. Without a claim, a disgruntled bidder may not have standing to object in the bankruptcy court to the sale process.

- **Exclusivity Agreements**
  - Exclusivity agreements are of dubious value in the chapter 11 setting because they are contrary to a fundamental objective of the bankruptcy process: obtaining the highest and best offer for the assets.
Due diligence is especially important in a chapter 11 sale

- The seller’s distressed situation may have caused its management to take aggressive or unusual measures in operating the business
- There may be no post-closing indemnification for breaches of representations and warranties. Although the buyer will take the assets free and clear of liens, there may be defects or unusual circumstances that only thorough due diligence will uncover
- Due diligence is key to understanding the assets and liabilities the buyer is willing to purchase and may permit the buyer to create a menu of options from which the seller can choose the transaction that best suits its goals
Documenting the Sale: *Executory Contracts*

- “Executory Contracts” are any contract between the debtor and another party under which both sides still have material performance obligations.

- Subject to certain exceptions and/or conditions, the debtor may assign *any* executory contract to a purchaser, even if the contract has anti-assignment or consent provisions:
  - In order to assign an executory contract to a purchaser, the debtor must first “assume” the contract and pay all amounts in default.

- A debtor has the ability to reject and renegotiate unfavorable executory contracts:
  - A rejection by a debtor of an executory contract is deemed to be equivalent to a breach of the executory contract as of the date immediately preceding the filing of the bankruptcy case.
  - Rejection excuses performance by the debtor of any of its future obligations under the contract, and the non-debtor party to a rejected contract has a claim against the debtor’s estate for any damages incurred by such non-debtor party as a result of such rejection.
Documenting the Sale: *Stalking Horse Asset Purchase Agreement*

- Subject to certain bankruptcy-specific points, a section 363 sale asset purchase agreement (the “APA”) is very similar to agreements used in non-bankruptcy transactions:
  - Clearly defines the purchased vs. excluded assets, as well as the assumed vs. excluded liabilities
  - Includes the purchase price, any adjustment mechanics and the deposit mechanics
  - Includes representations and warranties of the seller (generally more limited)
  - Includes restrictions on interim operations by the seller (generally more limited), but all restrictions are subject to the seller’s obligations under the Bankruptcy Code and/or any bankruptcy court order
  - Contemplates the various bankruptcy actions, such as seeking the bid procedures order and the sale approval order. Typically, drafts of both orders are included as exhibits to the APA. Also outlines the process for notice of assumption of pre-petition contracts and payment of cure amounts
Documenting the Sale: *Stalking Horse Asset Purchase Agreement (cont'd)*

- Identifies conditions to the closing, which include approval of the bid procedures order and sale approval order (generally without modification unless consented to by the stalking horse). Any HSR or other regulator approval is still required in a 363 sale, and purchasers may add additional conditions (e.g., related to employee retention).

- Includes standard termination rights, and the stalking horse may have due diligence and/or financing-related termination rights. Also, the termination provision will contemplate payment to the stalking horse of the break up fee (3-5% of the purchase price) and expense reimbursement (which is typically capped).

- Typically does not include an indemnity.

- The purchase agreement will be governed by the Federal bankruptcy laws, in addition to the appropriate state laws, and the parties will submit to the bankruptcy court’s jurisdiction for the resolution of disputes.
Additional Considerations: Benefits of Being the Stalking Horse Bidder

• Break-up fee of 3% to 5%
• Ability to negotiate terms of the initial APA
  – Other bidders must use stalking horse bidder’s APA, and normally cannot include any contingencies not included in stalking horse bidder’s APA
  – Other bidders must top the stalking horse bidder's offer plus break-up fee plus expense reimbursement by some additional topping amount
  – The stalking horse bidder has significant input on auction and overbid procedures and competing bid qualifications
  – The stalking horse bidder negotiates the form of order approving the sale to make sure it includes necessary bankruptcy protections
• Because of early activity, the stalking horse bidder is usually ahead of other bidders on due diligence, financial contingencies, and review of contracts to be assigned/rejected
• Possibility of early negotiations with the government concerning any environmental issues/transfer of permits
• Management and professionals are usually reluctant to drop the stalking horse bid because other bids may be uncertain
Additional Considerations: Risks of Being the Stalking Horse Bidder

- Stalking horse bid is subject to public disclosure
- Possibility of negative press if the stalking horse bidder loses the sale or does not close
- The stalking horse bidder may have limited ways “out” of the APA
- Potential to overpay as the stalking horse bidder
- The stalking horse APA, overbid procedures, break-up fee and expense reimbursement are all subject to court approval, objections, and competing offers/bids
Relevant Statutory Provisions: Scrutiny and Creditor Voting Issues

• A debtor's business judgment may be challenged in connection with a section 363 sale (in contrast, business judgment generally is not at issue in the context of a chapter 11 plan)

• As noted above, transactions involving insiders are subject to heightened scrutiny
  – The nature of the chapter 11 plan process, including the need to solicit the plan and obtain requisite creditor support, makes it more likely to meet a heightened standard
  – Without the safeguards of a disclosure statement and creditor vote, a court may be more likely to scrutinize a section 363 sale. It can be especially important to show that the sale price represents the highest or otherwise best offer and that negotiations were at arm's length

• Vetting a transaction through the creditor vote required of a chapter 11 plan may provide outside validation helpful to obtaining court approval and/or perceived reputational benefits

• In addition, a section 363 sale may be challenged as a "sub rosa" or "de facto" chapter 11 plan that attempts to avoid a formal disclosure statement, written plan, voting and meaningful opportunity for creditors to participate in the process

• Objections on these grounds ordinarily can be disposed of by showing that a sale does not provide for distribution of assets (as would a chapter 11 plan) and that, due to the erosion of value of a business in chapter 11, a section 363 sale is imperative
Relevant Statutory Provisions: Sales Free and Clear of Liens, Claims, and Encumbrances

• Section 363(f) provides that a sale may be free and clear of "any interest in such property," including all liens, claims, and encumbrances (11 U.S.C. § 363(f))

• Free-and-clear sales must meet at least one of five conditions:
  – nonbankruptcy law permits the sale free and clear of such interest;
  – the holder(s) of such interest consents;
  – the sale price exceeds the value of all liens on the property;
  – such interest is in bona fide dispute; and/or
  – the holder(s) of such interest could be compelled to accept a money satisfaction of such interest

• Assets in some cases may not be sold free and clear of certain interests, including:
  – deeded property interests (including certain oil and gas interests (See 11 U.S.C. 541(b)(4));
  – future products liability (even on account of products manufactured before section 363 sale); and
  – potential other claims (sometimes at a bankruptcy judge's ad hoc discretions)
Relevant Statutory Provisions: *Free and Clear - Products Liability*

- Courts disagree as to whether a purchaser can take a debtors' assets free and clear of certain liabilities that do not arise until after the sale, such as:
  
  i. where a product sold before the asset sale causes an injury after the asset sale;
  
  ii. where a person has been exposed to asbestos before the asset sale but does not manifest disease symptoms until after the asset sale; and
  
  iii. where an environmental-related accident occurs before the asset sale but does not result in clean up until after the asset sale

- Recently, the Second Circuit ruled that a bankruptcy court's asset sale order limiting specific pre-bankruptcy product liability claims required prior "actual or direct mail notice" to claimants when the debtor "knew or reasonably should have known about the claims." *In re Motors Liquidation Co.*, 2016 U.S. App. LEXIS 12848, *46-47* (2d Cir. July 13, 2016)
Relevant Statutory Provisions: Sales Subject to Court Approval

• Section 363(b) provides that a 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." 11 U.S.C. § 363(b)(1)

• The debtor bears the burden of showing that a sale should be authorized, but, as noted, courts typically apply the business judgment standard and will generally authorize a sale or sale process (subject to appropriate marketing of the assets, as described herein)

• Sales to insiders (e.g., existing equity owners) will be more closely scrutinized

• The Bankruptcy Rules require 21 days' notice for 363(b) relief, unless a court shortens the notice period for cause shown. FED. R. BANKR. P. 2002(a)(2)

• It may be difficult to obtain approval of whole-business sales on shorter notice. Even granting bid protections (including, among other things, break-up fees and expense reimbursements) may constitute the use of estate property outside of the ordinary course

• Smaller asset sales may be conducted pursuant to expedited procedures approved in advance. Such procedures (often called de minimis asset sale procedures) obviate the need for further authorization for transactions up to a court-approved cap and avoid the time and expense associated with an independent approval process for each sale
Relevant Statutory Provisions: Credit Bidding

- Section 363(k) grants secured creditors the ability to credit bid *(i.e., use an offset of any secured claims as consideration instead of cash)*. 11 U.S.C. § 363(k)

- A secured creditor may only submit a credit bid for collateral securing its claims

- Notwithstanding other evidence or parties' positions regarding the true economic value of the assets to be sold, a secured creditor may credit bid the full face value of its secured claims. See *In re SubMicron Sys. Corp.*, 432 F.3d 448, 459 (3d Cir. 2006)

  - There is no legal requirement that secured creditors include cash purchase price in addition to any credit bid

  - Nonetheless, in practice, debtors may require credit bids be coupled with (a) assumption or cash payment of administrative expense claims and/or (b) some cash payment to guard against the estate's administrative insolvency and potentially fund future distributions to unsecured creditors in order to avoid or resolve objections of unsecured creditors and other parties in interest
Relevant Statutory Provisions: Credit Bidding (cont'd)

- Secured creditors' rights to credit bid in assets sales under chapter 11 plans are governed by section 1129(b)(2) of the Bankruptcy Code and have been reaffirmed by the Supreme Court. See RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S.Ct. 2065, 2072 (U.S. 2012) (resolving a circuit split and holding that a secured creditor must be permitted to credit bid its secured claim under a proposed cram-down plan where the debtors seek to sell assets free and clear of liens).
- It is common for secured creditors to seek to "credit bid" acquired debt to purchase assets both in- and out-of-bankruptcy.
- In bankruptcy, the right to credit bid may be limited "for cause," which is typically found where:
  - liens are subject to challenge or bona fide dispute;
  - credit bidding was intended to cover a mix of assets subject to their perfected or unperfected liens (i.e., "mixed collateral"); or
  - the credit bidder acted in bad faith.
- More recently, however, certain courts have found "cause" to limit credit bids where doing so would "foster a competitive bidding environment"
Relevant Statutory Provisions: *Good Faith Requirements*

- Section 363(m) protects good faith purchasers from the reversal or modification of sale orders on appeal. *See* 11 U.S.C. § 363(m)
  - As a result, debtors and successful bidders often seek a waiver of the fourteen-day stay provided by Bankruptcy Rule 6004 in order to immediately close sales after obtaining court approval. *See* FED. R. BANKR. P. 6004(h)

- Section 363(n) prohibits collusion. *See* 11 U.S.C. § 363(n)
  - "Club deals" or other joint bids may run the risk of running afoul of this provision. Sufficiently robust marketing processes often can protect against allegations that the sale price "was controlled by an agreement among potential bidders" as provided by section 363(n)
  - A court may grant punitive damages in favor of an estate and against any such party that entered into a collusive agreement in willful disregard of section 363(n)
Relevant Statutory Provisions: Tax Considerations

• Section 1146(a) provides that certain sales are exempt from stamp or similar taxes (though case law regarding what taxes may be "similar" is unclear). See 11 U.S.C. § 1146(a)
  
  – The Supreme Court has held that the stamp-tax exemption does not apply to transfers made before a chapter 11 plan is confirmed (e.g., the majority of section 363 sales). See Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33 (2008). However, the Supreme Court has not addressed exemption as to a sale approved pre-confirmation and closing post-confirmation. See In re New 118th, Inc., 398 B.R. 791 (Bankr. S.D.N.Y. 2009) (property sale approved before but closing after confirmation, was "under a plan confirmed," so as to be exempt)

• Restructuring under a chapter 11 plan permits a debtor to retain net operating losses (valuable tax attributes that may reduce future income tax obligations). See 26 U.S.C. § 382

• By contrast, in a section 363 sale, net operating losses may be used by a debtor to shelter certain income from the sale proceeds but cannot be sold with the assets for future use by the business
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