

Acquiring Assets through US Bankruptcy

Issues to consider to proceed with confidence

Numerous businesses are expected to seek bankruptcy protection in the United States, presenting a once-in-a-lifetime buying opportunity for both strategic and financial investors. For many potential non-US buyers, the appeal may be a bargain opportunity to enter the world's largest market, acquire competitive product lines and technologies or build a US distribution network. But in order to take advantage of this opportunity, it is important to understand the unique US bankruptcy process, which is both sophisticated and complex.

Issues to Consider

Here are some things to know and issues to consider when contemplating acquisitions of assets through US bankruptcy procedures.

Deal with management. Unlike most insolvency regimes which require the appointment of an independent fiduciary (administrator) for the insolvent target company, the board and management retain control after a US Chapter 11 filing absent fraud or other special circumstances. Buyers therefore must deal with management in the first instance, although creditors will have influence and vote on any transaction that involves a bankruptcy plan.

It's an auction. No sale is final until approved by court order. Even though there may be official bidding procedures with deadlines for submission of offers, they occasionally will be ignored as it is the highest value to the bankruptcy estate that counts in the end, when the court enters its order.

Bidding protections. Standard M&A bidding protections such as break-up fees and expense reimbursement are available for the first, "stalking horse" bidder. However, separate court approval of these procedures is required in order for them to be enforceable.

Transparency. Creditors and other parties in interest are entitled to know, with few exceptions, a buyer's identity, the assets being acquired, terms of sale and other information some companies might prefer not to disclose under other circumstances. Buyers should assume news media access as well.

No side deals. Transparency means that all "side deals" must be disclosed, whether with management or other potential bidders. Once there is an official auction sale, agreements between competing bidders at the sale are prohibited by statute.

This is one of many ideas on ways to govern, manage, operate and finance your business. If you would like to review additional ideas, visit the Supporting Your Business section on www.bakermckenzie.com. The site is updated regularly, so visit often.

Creditors interests first. A US Chapter 11 bankruptcy case is designed to maximize creditor recoveries. The interests of creditors are always superior to subordinated creditors and to preferred and common shareholders. Shifting fiduciary duties of the target's board to include duties to creditors often creates additional leverage for a quick sale.

Bankruptcy benefits. Closing an acquisition in a US bankruptcy case can have several ancillary benefits, including the possibility of avoiding onerous contracts while overriding prohibitions for the assumption of beneficial contracts and licenses, leaving liabilities behind, limiting successor liability and, in certain circumstances, obtain other tax and labor advantages.

If speed counts: 363 Sales. A debtor can sell some or all assets, usually free and clear, on a simple motion for court approval that typically takes 30-60 days but can be less in "emergencies." Creditors cannot vote; only present legal objections and assert claims against sale proceeds. Courts seldom second-guess the business judgment of debtors (management) in deciding to sell a business.

Chapter 11 Plan sales. Alternatively, a purchase can be negotiated as part of a reorganization or liquidation plan for the target company that is a Chapter 11 debtor. Plan sales can have tax advantages, offer greater flexibility on deal structure (including issuance of stock with securities laws exemptions and statutory mergers), but they can take more time, cost more and require creditor voting. Acceptance of a plan requires the vote of two-thirds of the value and a majority of the number of creditors voting in each creditor class. At least one impaired class must vote in favor for the court to "cram down" the sale, or compel rejecting classes to accept the plan, if the plan is held to be "fair and equitable" to all classes.

Our experience and service advantages

A global perspective. All points of view. From major multinationals to mid-market leaders, our US bankruptcy practitioners have rich and highly relevant experience in representing the interests and protecting the rights of both debtors and creditors in Chapter 11. Our clients range from bankers, bondholders and shareholders to key suppliers, providers of debtor-in-possession financing and third-party purchasers. We understand the motivations as well as the levers of negotiation to help you obtain the best outcome, regardless of your interest.

A sophisticated, culturally attuned approach. For many clients, especially those who speak English as a second language, US bankruptcy processes can be daunting. In addition to our deep knowledge of the US code and courts, we bring to the process an instinctive appreciation for, and a proven ability to respond to, the cultural and language barriers that must be overcome to protect your interests and comply with the requirements of the courts.

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