



CHAPTER 11 SALES: A Preferred Option

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It seems that not a day goes by without a news report about a familiar business filing for Chapter 11 bankruptcy and some discussion about selling the business or its assets through the bankruptcy process. But what does that really mean? Why and how does it happen? And, importantly, why is a sale through

the bankruptcy process a preferred route for distressed companies and buyers alike?

Sales in a Chapter 11 case are governed by the Bankruptcy Code (the “Code”) and, specifically, Code Section 363, which provides the rules of the road for such a sale. And while the process may seem complicated, many significant benefits flow if the rules are followed. Perhaps the most important benefit is the finality of the sale. Buyers do not want to run the risk that the sale they just spent a lot of time and money on somehow gets undone at a later date. Once the Bankruptcy Court approves the sale and makes certain rulings as part of the process, the sale cannot be unwound, even if some disgruntled party takes the matter up on appeal. Finality is a powerful inducement to utilize the bankruptcy process to conduct sales.

Another incentive for conducting sales through a Chapter 11 process is that the risk of potential successor liability claims is largely eliminated. It is all too common for litigation to be pursued against “anybody and everybody” who ever touched a product or company in the hopes that something will stick or a case will settle for at least nuisance value. A properly drafted sale order will contain language insulating the buyer from any liability should a claim be asserted later.

Finally, unless otherwise agreed by the parties, the buyer obtains the assets or business free and clear of all claims, liens, and other interests. This is especially important when real estate is involved. In fact, there is nothing better than a Bankruptcy Court sale order to allow a title officer to sleep soundly at night, as such an order will prevent latent title claims from becoming a reality.

While the Chapter 11 process can appear complicated, the potential benefits of conducting a sale through this process significantly outweigh any of the burdens.



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