



What a Deal! Buying Assets Out of Bankruptcy

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Introduction



- Overview of bankruptcy sales
- Case Study: Tully's
- Case Study: THQ



Chapter 7 Bankruptcies



- Permits operation of business for only a limited period
- Requires appointment of professional trustee to manage operations
- Existing management divested of control
- No creditors' committee or equity committee

Chapter 11 Bankruptcies



- Permits operation of the business
- Existing management stays in control
- Court may appoint creditors' committee, equity committee
- May liquidate assets or pursue a reorganization

Types of Bankruptcy Sales



- Everything must go! Straightforward liquidation
 - Borders, Circuit City
- Sale of some or all assets as a going-concern
 - General Motors, Chrysler
- Selective sale of some assets as part of reorganization
 - Delta Air Lines
- Business judgment rule for decision to sell

Means for Pursuing Sales



- Ordinary course of business under 11 U.S.C. § 363; no court approval required
- Use, sale or lease outside of the ordinary course of business; court approval required
 - Vague standard for ordinary-course
 - Sometimes debtor will obtain order defining ordinary-course

Reasons for Pursuing a Sale



- Free yourself of burdensome contracts and leases while keeping damage claims low
- Deliver title free and clear of claims and interests
 - *Clear Channel*
- Leave behind burdensome debts

Process for Small Sales



- Negotiate sale
- No lock-ups or exclusivity agreements generally permitted
- Sale agreement often not binding until approved by court
- Court will require evidence of a reasonable price

Process for Big Sales



- Extensive marketing process, with confidentiality agreements and data rooms
- Stalking-horse bidder
 - Deal protections may include break-up fee of up to three percent or expense reimbursement provisions
- Bid procedures order
- Terms publicly-announced, higher or better bids invited
- Auction
- Sale hearing

Tully's - Background



- 57 company stores
- 12 kiosks at Boeing
- 71 franchise locations (e.g., grocery stores)
- 600 employees
- No secured debt; growing trade payables
- \$5.8 million gift card exposure
- Burning cash at rapid rate
- Financing/sale efforts outside ch. 11 failed



Tully's - And the Winner Is?



- The Sale Process
 - Enter Patrick Dempsey
 - Enter Starbucks
 - Enter the “other” players
- The Auction
 - The auction (confusion at the end)
 - The Bankruptcy Court hearing
- Lessons for the business lawyer – drafting intellectual property and related contracts



Tully's - Strategy



- Debtor's strategy
 - Reject unprofitable leases
 - Sell assets in section 363 sale
 - Assume and assign contracts and leases:
 - Leases
 - Intellectual property licenses
 - Other executory contracts
- Stalking horse bidder – Kachi Partners



THQ - The Players



- THQ, a major game developer for Xbox, other platforms
- Clearlake, the stalking-horse bidder
- Other interested bidders
- Microsoft, other licensors



THQ - Issues



- Pursuing sale of assets
- Portfolio of games in development, being sold in the market
- Assignment of intellectual property rights, licenses
- Non-exclusive copyright and trademark licenses



THQ - Events in the Case



- Filed December 2012
- Stalking-horse bidder, DIP provider
- Court demands longer marketing period
- Auction of assets results in sale of pieces of company
- IP issues resolved (so far)



Questions?



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Ragan Powers represents investors, secured and unsecured lenders, debtors and lessors in restructuring and bankruptcy. He handles out-of-court workouts and restructurings, consensual and litigated chapter 11 cases, distressed business transactions and related litigation. Ragan has helped clients with a range of issues including underperforming equity investments, large secured transactions, management of troubled loan portfolios and distressed financing arrangements.

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