

2021 Winter Leadership Conference

"Can Someone Please Tell Me What to Do?" How Best to Sell Your Assets

Hosted by the Asset Sales and Financial Advisor Committees

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"Can Someone Please Tell Me What to Do?" How Best to Sell Your Assets

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Panelists

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Overview

• This panel will discuss how best to effectuate a sale of assets, including discussions around 363 sales, Article 9 Secured Lender Foreclosures, Receiverships, and Assignment for the Benefit of Creditors. We will discuss three scenarios and hear from a lawyer, financial advisor, and investment banker on what they feel is the best way to sell the assets of the company.

Options to consider

■363 Sales

Secured Creditor Foreclosure

Receiverships

Assignment for the Benefit of Creditors

363 Sales

What is it? Section 363 of the Bankruptcy Code generally permits a debtor to sell its assets "free and clear" of liens, claims, and encumbrances. The assets are marketed broadly to solicit interest from potential buyers and typically/hopefully culminates with an auction among qualified bidders.

How do you start? Bid procedures set the timing and framework for the sale process, including bid requirements and the auction date. The debtor may name a stalking horse bidder to set the floor price for the auction and to entice over-bidders to participate.

Key Features? Ability to convey assets free and clear while minimizing successor liability risk. Can assume and reject contracts or leases and force hold out creditors to accept the outcome.

363 Sales (cont'd)

Advantages: Straightforward process that can be run very quickly if the assets are marketed properly. Protection from other legal proceedings that could affect or kill the going concern value. Transparency for creditors, with clearly defined rights and a centralized forum for litigation.

Disadvantages: Typically, very costly and can be time consuming which may jeopardize the going concern value of the assets.

Best suited for: Going concern businesses with adequate capital or access to collateral to fund the process and those that need relief from creditors, litigation, or some other outside issue impacting the business.

Options to consider

363 Sales

Secured Creditor Foreclosure

Receiverships

Assignment for the Benefit of Creditors

Secured lender foreclosure

What is it? Process for enforcing a judgment or collecting a debt secured by real or personal property. May take place via state law (judicial or non-judicial) or federal law (judicial only).

How do you start?

- Federal: file a complaint. Must have basis for federal jurisdiction.
- State: file complaint (judicial), file/serve/record notice of default (non-judicial)

Key Features? Vary extensively by jurisdiction (state/federal) and type (judicial, non-judicial).

Secured lender foreclosure (cont'd)

Advantages: Straightforward process, may be fast, relatively low cost. Flexible - can be combined with an ABC or run as a "friendly" foreclosure and wipe out junior lienholder claims.

Disadvantages: Judicial options can be slow, no stay or avoiding powers, no ability to assign contracts or address 3rd party claims.

Best suited for: real estate collateral, real estate subject to multiple liens, and businesses with minimal operations or when a debtor will not cooperate with the lender.

Options to consider

363 Sales

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Receiverships

What is it? Judicial process where Court, upon request of creditor, appoints 3rd party to manage affairs of the debtor.

How do you start? File a complaint in proper court. May be *ex parte*. Must have basis for federal jurisdiction for federal receiver. The order and what it allows the receiver to do is of the utmost importance.

Requirements? Generally, the party seeking a receiver must show the existence of a valid claim, the probability of mismanagement, fraudulent or inappropriate conduct, danger of loss/diminution of property, inadequacy of legal remedies, or lack of a less drastic alternative. Often similar to preliminary injunction standard.

Receiverships (cont'd)

Advantages: Court supervision makes this a good option for situations with an unscrupulous or uncooperative debtor. May provide insulation from lender liability. A receiver is able to operate a business, manage property, and sell assets per court order. Unsecured creditors have no automatic standing, but may intervene.

Disadvantages: Not fast or cheap. Process more cumbersome than other alternatives. No ability to assign contracts without consent and questionable avoidance powers. Most state and federal courts are clogged, and you can't always get what (who) you want.

Best suited for: Real estate businesses, enforcement of remedies for default and often in unwinding fraudulent investment (Ponzi) schemes.

Options to consider

363 Sales

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Assignment for the Benefit of Creditors

ABC's

What is it? A general assignment provides a means of liquidating the assets of an assignor in an orderly, controlled manner under state law. A general assignment is a vehicle used for the sale or liquidation of a business. It is not used to financially rehabilitate or "turn the business around."

How do you start? The distressed company (assignor) enters into an agreement with the assignee to have them complete a going concern sale or wind-down and/or liquidation of the assets for the benefit of the assignor's creditors. The assignor transfers all of its right, title, and interest in its property to the assignee which will distribute proceeds from the sale in a fiduciary capacity.

Requirements? General assignments are either common law or statutory and the law varies from state to state as to which rule(s) govern. Generally, the states will follow one of two approaches to the assignment process: one approach requires court supervision of the assignment and the assignee; the other permits assignments to proceed without court supervision, but require that the assignee follow whatever common law or statutory structure in that state as applicable to and governing the liquidation of a business and its assets

ABC's (cont'd)

Advantages: Assignor has the ability to choose an assignee with appropriate experience to conduct the sale. The assignment process allows an assignee to sell the assets free of the unsecured debt that may have otherwise prevented an acquisition. All of this can be accomplished quickly and with limited publicity.

Disadvantages: No court order approving the sale stating, "free and clear." Executory contracts and leases cannot be assigned without consent of the counter party. Secured creditor consent is also generally required and there is no automatic stay.

Best suited for: When a quick sale is needed in order to maintain going concern value and a buyer is not willing to assume unsecured debt as part of the transaction.

What to discuss before making a decision

- 1. Goals for the sale
 - a) Maximize value of the assets and recovery for creditors
 - b) Minimize expenses and time spent completing the sale
 - c) What else is important to the owner/debtor and creditors?
- 2. What professionals are needed
 - a) DISTRESSED EXPERIENCE IS KEY
 - b) Do I need an FA and/or IB?
 - c) Local counsel the importance of local rules
 - d) Are Independent Directors necessary?

Discuss Hypothetical Examples





SARE Hypothetical

Case: Single asset real estate ("SARE") with less than forthcoming borrower

Issue: Title issues will impact timing and path for recovery

Professionals: Who to hire - IB or FA?

Facts

Bank loan financed construction of facility; senior secured lien on all assets; principal guarantees

Property expected to appraise for double the amount of the loan

Construction completed and operations commenced few years prior to COVID

COVID issues and concerns have significantly impacted demand

Borrower has repeatedly advised bank there is a sale on the horizon, which never closes

Allegedly there is a new offer, necessitating the bank take a discount, or finance the deficiency; bank believes a current appraisal supports a higher value

believes a current appraisal supports a nighter value

CRO hired and uncovers more bad news; litigation with an adjoining property owner, and title issues

What should they do?!

Restaurant Hypothetical

Case: Restaurant chain in financial and operational distress

Issue: Sell or restructure

Professionals: Who to hire – IB or FA?

Facts:

Regional well-known chain; multiple owned and franchised locations;

Prior Revenue robust; EBITDA marginal put positive Senior secured term debt with first lien on all assets

Private equity sponsor sees market risk and unwilling to fund losses

All locations leased; one piece of sizeable owned RE (e.g. warehouse/ghost kitchen/corp office)

Landlord relief requested and rejected

What should they do?!

Waste and Recycling Hypothetical

Case: Recycling, landfill and weigh station company is not in compliance with environmental regulations

Issue: Compliance costs may exceed valuation

Facts:

Mid-sized company with operations and properties throughout the Southeast

Various banks hold mortgages and liens on each property; significant unsecured obligations

Out of compliance with state regulatory requirements, facing possible injunction against continuing to receive waste

Projected cost to remedy compliance is several million dollars in excess of FMV as a going concern; liquidation value is 50% of FMV

A fire destroyed one of the facilities; insurance claim pending

Family patriarch passed away and other management is weak

What should they do?!



Faculty

James D. Decker, CIRA is the founder of JDecker & Company, Inc. in Atlanta, which is focused on corporate governance, transactional advisory and litigation support. As an independent director, he serves on the boards of middle-market private companies typically undergoing transformational events. Mr. Decker's board service has included the capacities of board chairman and chair of special committees and restructuring committees. He is qualified as an Audit Committee Financial Expert. In addition, he has also served as an arbitrator and testifying expert, and is well versed in the fiduciary obligations of directors. For the 30 years prior to founding JDecker & Company in 2019, Mr. Decker was an investment banker and advisor in the U.S. middle market, with a focus on advising clients in complex corporate finance transactions, mergers & acquisitions, recapitalizations and restructurings. He advised owners, boards, special committees, management teams and creditors across a wide range of industries and circumstances. In the course of his investment banking career, Mr. Decker originated and completed hundreds of transactions worth in excess of \$30 billion. These included restructurings, exclusive sales, acquisitions, special-situation financings, leveraged buyouts, loan placements, recapitalizations and valuations. He also recruited, developed and managed large teams of professionals at a variety of prominent institutions, including Guggenheim Securities, Morgan Joseph, Alvarez & Marsal and Houlihan Lokey. Mr. Decker is a Fellow in the American College of Bankruptcy and has twice received Turnaround of the Year Awards from The M&A Advisor. He is also a past director of the Association of Insolvency and Restructuring Advisors (AIRA), a former co-chair of ABI's Investment Banking Committee and a former director of the Turnaround Management Association (TMA). Mr. Decker enjoys teaching and is a frequent speaker on corporate finance, mergers and acquisitions, capital markets and financial restructuring. He maintains Series 7, 24 and 63 FINRA licenses. Mr. Decker received his B.A. in economics and geology from Vanderbilt University and his M.B.A. in business administration with a concentration in finance from the Wharton School of the University of Pennsylvania.

Matthew LoCascio is a principal with SC&H Capital, Inc. in Ellicott City, Md., and has been providing investment banking services to companies in transition since 2005, starting with Equity Partners, then in 2020 creating the special situations group within SC&H Capital, an investment banking and business valuation advisory firm for middle-market businesses. He has handled investment banking engagements for over 140 companies in a host of industries. Mr. LoCascio has been a speaker and author related to distressed sales, bid procedures and marketing processes, has been published in TMA's Journal for Corporate Renewal, and has also testified in numerous bankruptcy courts regarding sales processes and procedures. He has spent his entire career working with middle-market companies, often family-owned and multi-generational. He currently serves as the Education Director for ABI's Asset Sales Committee, having previously served as its Special Projects Leader and, before that, as Communications Manager. In his current role, his primary responsibility is to organize and present programs at ABI's Annual Spring Meeting and Winter Leadership Conference. Prior to joining the insolvency world, Mr. LoCascio worked for Marsh & McLennan, a global professional services firm, where he provided risk-management, risk-consulting, alternative-risk-financing and insurance program management services to middle-market businesses. He is a FINRA Registered Investment Banking Representative (Series 79). Mr. LoCascio received his undergraduate degree from the University of Pennsylvania.

Dawn Ragan, CTP is a partner with CR3 Partners LLC in Irving, Texas, and has more than 25 years of experience in financial advisory, turnaround management and corporate finance. She develops operational and financial restructuring solutions, and manages multiple adverse constituencies. Her engagements have included assets and operations in China, Japan, Europe, Australia, Argentina, Mexico, Canada and the U.S. Ms. Ragan has served clients in a variety of leadership roles, including CRO, CFO, plan agent, trustee and financial advisor, and she has provided expert witness testimony and litigation support. In 2017, she was the financial advisor to the chapter 11 trustee of three debtors involved in a \$2B fraud; her engagement was awarded multiple Turnaround of the Year awards. Prior to her consulting career, Ms. Ragan spent nine years in investment banking and was a real estate portfolio asset manager. She has served as a speaker on a number of national panels and is an active member of the restructuring community holding memberships with ABI, TMA, AIRA and IWIRC. Ms. Ragan received her B.S. *magna cum laude* from Regis University and her E.M.B.A. from Southern Methodist University.

Sarah Beth Wilson is a partner with Phelps Dunbar LLP in Jackson, Miss., where she specializes in the representation of lenders and other financial institutions, as well as business and governmental entities in business bankruptcy matters, creditors' rights litigation and lender liability litigation in federal district courts and bankruptcy courts throughout the region. She regularly handles asset sales of all forms and counsels and represents clients at every stage when it comes to complex insolvency and restructuring matters, as well as in connection with large-scale loan modifications, foreclosures and UCC sales, and other manners of security interest and lien-realization. Ms. Wilson frequently represents creditors and lienholders with respect to issues affecting priority and rights in various types of collateral, including real property, entity ownership and membership interests, cash collateral, commercial rents and leases, and state and federal tax liens. She is Board Certified in Business Bankruptcy Law by the American Board of Certification and was appointed to Mississippi's Board of Banking Review; in this role, she currently represents the 22 counties within Supreme Court District 1 (including the State's Capitol City of Jackson and all surrounding metro areas). She currently chairs the State Banking Board. Ms. Wilson was selected by the bankruptcy judges within the State of Mississippi for the State's Local Rules Advisory Committee, which promulgates and proposes new and revised rules that govern practice and procedure in bankruptcy courts across the state. She was asked to step into the role of chairman in 2018 and became the first female to hold the role within the state. Ms. Wilson was recognized as "Young Professional of the Year" in 2018 by the Madison County Business League and Foundation and the Madison County Economic Development Association, and she has been selected as one of the "Leading Women in Business," as a "Leader in Law" and as one of the "Top 50 Under 40" by *The Mississippi Business Journal*. In addition, she has been selected every year since 2014 as a "Rising Star" by Super Lawyers Magazine, been named to the "Under 40 Hot List" by Benchmark Litigation, and is recognized in The Best Lawyers in America in the areas of Business Bankruptcy Litigation and Creditors' Rights. Ms. Wilson is an appointed member of the Mississippi Bankers Association's Bank Attorneys Committee, and she served on the official transition team for Mississippi Attorney General Lynn Fitch in connection with her transition from her former office of Treasurer of the State of Mississippi. She also has served as an attorney coach of numerous appellate and trial advocacy moot court competitions, and has taught numerous years of students as an adjunct and visiting professor at Mississippi College School of Law and Millsaps College. Ms. Wilson received her B.B.A. cum laude in accounting and economics in 2007 from Millsaps College and her J.D. magna cum laude from the Mississippi College School of Law in 2010.