

## Tip # 8: There are Big Advantages in Selling Business Assets through a Bankruptcy.

By Kim Fineman

Back in Tip # 4 we mentioned a “liquidating plan” in a Chapter 11 case. A Chapter 11 case is traditionally thought of as a reorganization, and not a liquidation case. However, that distinction is really only in comparison to a Chapter 7 in which you, in essence, turn over the keys and walk away. In a Chapter 11 case, the business debtor generally stays in control. But filing a Chapter 11 does not necessarily mean you are obligated to continue your business operations for the three to five year typical Plan period. As we discussed in Tip # 7, the specifics of your Plan in a Chapter 11 are totally left to your discretion. Included within those possibilities is a sale of the business assets, which may wrap up your case relatively quickly.

Another possible variation in a Chapter 11 case is to have the sale of substantially all of the assets prior to the formulation and approval of the Plan. These are called “363 Sales” which is a reference to the section of the Bankruptcy Code governing such sales. In such a situation, the debtor must provide a good business justification for the early sale of assets outside a Plan. However, such a reason can simply be that the value of the assets is rapidly diminishing. Some or all of the assets can be sold in a pre-Plan sale, with the Bankruptcy Court’s approval, and there can also be multiple separate sales. If substantially all of the business debtor’s assets are sold prior to the Plan, then the Plan can simply provide for the distribution of the sale proceeds.

There are several advantages to selling your business assets through a Chapter 11 case:

- Management can stay in place to sustain business operations.
- Continued operations by knowledgeable management, maximizes the value to be obtained from the sale.
- The debtor business then has time to market the assets without the “fire sale” atmosphere.
- Buyers receive the cleanest transfer of title possible, without the attachment of seller’s debts, via an order from the Bankruptcy Court approving the sale free and clear of liens and interests.
- The seller has the ability to assign most leases and existing contracts to the buyer as part of the sale, even without the consent of the other party to the lease or contract.

A sale of assets in a Chapter 11 case can either be a private sale to a specified buyer or a sale to the highest bidder in an auction format. Under either scenario, the Bankruptcy Court will require the selling debtor to demonstrate that the assets have been adequately marketed to obtain the highest and best return possible. Keep in mind too that any party in the bankruptcy case can object to the proposed sale and any such objection will weigh heavily against the Court’s approval of the proposed sale. For those reasons, Chapter 11 debtors generally have the Court approve the proposed marketing and sale procedures ahead of time. Having overbid procedures also helps eliminate any objection that the proposed sale is a sweetheart deal not representing the true market value of the assets. If there are overbid procedures and the assets are sufficiently marketed, then the Court will generally be satisfied that the market has spoken as to the true value of the assets being sold. To encourage overbids, the Court may also approve certain bid protections for a proposed buyer, including a set breakup fee, costs and bidding increments.

Each of these pro-sale mechanisms—which simply are not available outside a Chapter 11 case—help maximize proceeds from the liquidation of business assets.