

Bankruptcy, Restructuring & Commercial Law Advisory

JANUARY 31, 2014

Are Credit Bids in a Deep Freeze?

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A Delaware bankruptcy court recently limited a secured creditor's right to credit bid an acquired claim to the purchase price of that claim. In *In re Fisker Auto. Holdings, Inc.*, 2014 Bankr. LEXIS 230 (Bankr. D. Del. January 17, 2014), the United States Bankruptcy Court for the District of Delaware addressed a motion by Fisker Automotive, Inc. ("Fisker") to sell substantially all of its assets (the "Sale Motion") to Hybrid Tech Holdings, LLC ("Hybrid"). Hybrid had purchased a loan from the Department of Energy, valued at \$168.5 million, for \$25 million about one month before the Fisker bankruptcy. In the Sale Motion, Hybrid sought to credit bid its claim for \$75 million, waive certain other claims, assume specified liabilities and provide some funds for unsecured creditors. The Creditors' Committee (the "Committee") objected.

The Committee's ultimate objection centered on Hybrid's right to credit bid, and the chilling effect the credit bid would have on the sale process. Indeed, in addition to Hybrid, another potential purchaser had been identified, Wanxiang America Corporation ("Wanxiang"), but Wanxiang would not participate in a sale process unless Hybrid's credit bid was capped at \$25 million. Accordingly, the Court reviewed Hybrid's right to credit bid, and whether that right should be limited.

The Court quickly concluded that Hybrid had the right to credit bid: "Hybrid paid \$25 million for its claim. It will be entitled to credit bid." The only question was, in what amount? The Court turned to Section 363(k) of the Bankruptcy Code, which permits a court to modify credit bid rights "for cause." The Court explained that "for cause" is not limited to situations involving inequitable conduct. Instead, a court may deny the right to credit bid in the "interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to foster a competitive bidding environment." Also, a court may deny credit bidding if it would "chill the bidding process."

The Court found that the "decision to authorize an uncapped credit bid under the facts of this case would be unprecedented and unacceptable." Were Hybrid allowed to fully credit bid its claim, bidding would not be chilled, "bidding would be frozen." And other bidders existed. Wanxiang was prepared to increase its offer in an auction. The Court described Wanxiang as "a highly attractive and capable participant," which had a vested interest in purchasing Fisker's assets based on its previous investments in the electric car space. Further, while these factors alone may have justified the Court's cap, the Court also found that Hybrid had insisted on an "unfair (hurried) process" for the sale, with only 24 business days available for challenging the Sale Motion, and that Hybrid's secured status was questioned and undetermined.

Will there be a spring thaw? Time will tell as the decision is on appeal. However, until the appeal runs its course, when buying debt with the intent to acquire the underlying asset, the purchaser must be aware that the bankruptcy court has the authority to limit the amount of the credit bid. As in this case, a court can balance the policy of fostering a competitive sale process to maximize the value of the assets to the estate against the secured creditor's right to credit bid its debt to protect its own interests. Here, the scales tipped in favor of the estate.

If you have any questions about the issues raised in the *Fisker* decision or general questions about this advisory, please call your principal Mintz Levin attorney or one of the attorneys noted on this advisory.

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3665-0114-NAT-BRC