Viewpoint

One of a series of opinion columns by bankruptcy professionals

Communications And The 363 Sale Process

By Maya Pogoda and Sandra Sternberg

As the economy continues to throttle more and more financially borderline corporations, troubled companies and their advisers are increasingly turning to what is known as the “363 sale” to engineer their way out of bankruptcy and liquidation. General Motors did it; Chrysler did it; the Chicago Cubs did. Companies as diverse as publisher Freedom Communications and government information technology contractor BearingPoint are turning to 363 sales to secure a future for their businesses.

Often negotiated as part of a pre-negotiated or prepackaged Chapter 11, the 363 sale, named after the section of the Bankruptcy Code in which it is found, allows debtors to sell assets “free and clear” of all liens, claims and encumbrances. It also provides a controlled process for entertaining and evaluating bids and completing the sale process expeditiously.

But while the 363 process may be straight forward and relatively swift, the potential for disrupting the business is not. From the time the possibility of a sale process is announced to the time it is completed may mean serious distraction to the debtor's ongoing business, as employees, customers and vendors, in particular, ponder the future of their jobs, their business relationships and the products they purchase. And those imponderables surely impact a business' performance during this time and have a direct impact on how it is valued during the process.

That's why it's critical that the debtor company implement a robust communication plan to ensure that the business continues to operate as close to normal as possible. But as with all things related to restructuring and asset sales, the communications process during this time, in particular, is not a straightforward one. As the debtor readies to sell its most attractive businesses and assets, sever its ties and trust with employees, vendors and customers, it also loses the ability to provide any long-term assurances for their and the company's future.

Messaging and media take on heighten complexity. Explaining the process is the easy part. Assuring a safe landing for all concerned is not; and that is precisely what insiders and the public are looking for. Because the process requires confidentiality and many of the most critical questions simply can't be answered, rumor and speculation breed even more uncertainty and misinformation.

Left unchecked, erroneous or misleading news coverage can skew the process, either by deterring potential bidders, manipulating the players and sometime impairing the perceived value of the asset. That's why it's critical that companies engage the media from the start of the process, so that it is clear from the beginning that the debtor is running the sale process and not being run over by it.

Asset sales, particularly 363s, bring out the speculator in just about everyone. And usually feeding the speculation frenzy are “tidbits” found on the financial blogs, in distressed debt websites and other specialized deal media. They work on a 24-hour-a-day news cycle with their best tips coming from “unidentified sources” and “persons with knowledge of the deal” (or so they claim). These media can help you or hurt you simply by amplifying the uncertainty inherent in the 363 process. The trick for debtor companies is to know the difference and stay ahead of the curve. That requires knowing, every day, what's being said and what's being reported, getting the inaccuracies out of stories and making sure your messaging and facts get in.

Managing expectations of key stakeholders - employees, suppliers and customers - in a 363 process becomes more important than ever. Employees want to know: “What about me...my job...my pay...my benefits...my future?” It's going to be tough keeping them focused on the work they're being paid to do and even tougher to reassure them when the answers they seek are not yours to give. Maintaining productivity and stability during transition requires delicacy and deft communications and should not be left to beginners.

Vendors, already feeling the sting of prepetition losses, may not be so quick to embrace the change, at least not without imposing tough, costly terms on future purchases. Customers' loyalty and acceptance will be tested, as well. A customer has selected your product or service over a competitor's for a reason. They may not be comfortable to learn that the new owner is that competitor. And how will the transaction impact their business?

An effective communication plan for a debtor undergoing a 363 sale process needs to address these concerns and answer some tough questions. While the objective of a communications program in this situation remains the same through the duration of the process - to stabilize the business and promote a business as usual

continued on next page

Viewpoint

One of a series of opinion columns by bankruptcy professionals

continued from page 11

atmosphere in order to secure the value of the assets and in turn maximize creditor recovery - the tactics employed must be able to keep up with each twist and turn in the process. That's why it's critical that a company surround itself with professionals - including communication professionals - who have the experience and expertise to guide them through the entire process.

The 363 sale process adds volatility during a time of significant change and uncertainty. A thoughtful, well-implemented communication plan becomes just as important as, and should be integrated with, the legal and business strategy not only to preserve the value of the asset during the transition, but to provide a strong foundation for recovery and future growth.

Maya Pogoda is a senior member of the Sitrick Brincko Group LLC corporate restructuring practice. She can be reached at maya_pogoda@sitrick.com.

Sandra Sternberg of Sitrick Brincko Group LLC has been lead executive on scores of court-supervised and out-of-court restructurings. She can be reached at sandi_sternberg@sitrick.com.