



Premerger notification requirements complicate bankruptcy sales

Sales of distressed assets or equity interests must still comply with Hart-Scott-Rodino's requirements regarding anti-competitive transactions.

BY TYE C. HANCOCK, RHETT G. CAMPBELL
AND MILLIE SALL

For companies in financial distress, § 363 of the U.S. Bankruptcy Code is often a preferred tool to effect a sale of a company's assets or equity interests. Under § 363, a debtor may sell or lease its property outside the ordinary course of business, free and clear of liens, claims and encumbrances. See 11 U.S.C. 363(b), (f). Section 363 sales are often time-sensitive due to deteriorating asset values, but there is no bankruptcy exemption from compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR). Accordingly, developing a strategy to address the requirements of HSR is critically important in any qualifying transaction.

Under § 7 of the Clayton Act, it is unlawful for any person to acquire the assets of another company if the "effect of such acquisition may be substantially to lessen competition." The primary purpose of HSR is to

provide a mechanism for the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) to review potentially anti-competitive transactions before they occur, thereby reducing the costs of unwinding prohibited transactions and avoiding anti-competitive effects. Under HSR's premerger notification program, certain qualifying acquisitions of voting securities or assets must be reported to the FTC and DOJ, prior to consummation, through the filing of a notification and report form.

After the agencies are notified, the parties must wait a specified period before consummating the transaction. The specified waiting period is typically 30 days, which is reduced to 15 days in bankruptcy. See 15 U.S.C. 18a(b); 11 U.S.C. 363(b)(2). If no additional request for information is made, the parties may proceed with the transaction. However, if either agency requests additional information through a "second request," the waiting period is automatically extended.

In a bankruptcy sale, the waiting period is limited to 10 days after compliance with the second request.

A second request can be onerous and combines interrogatories and document requests, but compliance with the second request is mandatory before the transaction can lawfully close. Failure to comply can result in a civil penalty of up to \$16,000 per day for each day the violation continues. Officers and directors can be personally liable, and penalties assessed post-petition may be entitled to priority treatment under the code.

After compliance with the second request, the requesting agency will decide whether to seek an injunction to prevent the parties from consummating the transaction. Generally, acquisitions are only subject to HSR's reporting requirement if no exemption applies and the size of the transaction exceeds \$263.8 million or is between \$66 million and \$263.8 million and other criteria based on the parties' assets and sales are

satisfied. The dollar thresholds are effective for fiscal year 2011 and are adjusted yearly.

Statistically, second requests are rare. In fiscal year 2010, 1,166 transactions were reported under the act but second requests were issued in only 4.1% of transactions. The rate of second requests during the past 10 years has averaged 3.3%. During fiscal year 2010, most second requests occurred in transactions ranging in value between \$200 million and \$300 million.

To expedite the approval process, parties should consider taking a proactive approach with regulators. Most bankruptcy sales occur in the context of an auction. Therefore, bidders or potential bidders should file premerger notification forms as early as possible to expedite approval. Strategic advantages can be gained by bidders who obtain preauction approval of their proposed transactions, including the argument that their bids are superior to others who have not obtained similar approval. Bids submitted subject to antitrust approvals may be viewed less favorably due to the risk of an action by regulators to enjoin the sale. Further, potential bidders may argue that those who have not obtained prior HSR approval are not qualified to bid.

Because of the shortened waiting period in bankruptcy, it may be difficult to avoid issuance of a second request. A potential buyer should establish a cooperative dialogue with the staff of the applicable agency and consider providing information in advance to avoid a burdensome second request. It may be appropriate in certain circumstances to withdraw one's premerger notification form — with the intent of refiling — in order to extend the agency's deadline for issuing a second request. Otherwise, a regulator may be forced to issue a burdensome second request merely to preserve its rights under the act.

A prospective buyer should consider assembling relevant information early

so as to eliminate delays in processing a second request. The model second request may be used — in addition to other sources — to narrow the possible categories of information that may be requested by regulators. In the event a second request is issued, pre-emptive document gathering may enable the applicant to respond quickly and initiate the reduced 10-day bankruptcy waiting period, which could facilitate ultimate approval or make an enforcement action difficult.

The U.S. district courts have original and exclusive jurisdiction over all bankruptcy cases and exclusive jurisdiction over all property of the estate — wherever located. Bankruptcy courts function as units of their district courts, receiving referrals of all cases and proceedings pursuant to 28 U.S.C. 157(a) and standing orders of reference entered in each district. By statute, bankruptcy courts have jurisdiction to hear and finally determine all cases under the Bankruptcy Code and all “core” proceedings, including “proceedings affecting the liquidation of the assets of the estate,” which necessarily includes sales of the estate's assets and objections to such sales. See 28 U.S.C. 157(b)(2).

The FTC's enforcement tools include administrative adjudicatory proceedings and judicial enforcement proceedings that may seek injunctive and other equitable relief. Generally, such proceedings are an exercise of police or regulatory power by a governmental unit and are not stayed by the commencement of a bankruptcy case. See 11 U.S.C. 362(b)(4); *In re Dolen*, 265 B.R. 471, 480-81 (Bankr. M.D. Fla. 2001).

Although objections to a § 363 sale of a bankruptcy estate's assets may be considered core proceedings under the code, a bankruptcy court is likely not the forum of choice for regulators seeking to enjoin a sale. See, e.g., *In re Financial News Network Inc.*, 126 B.R. 157, 161 (S.D.N.Y. 1991). A lawsuit by the FTC to enjoin a party from consummating a transaction may be

brought in any district court where the violating party resides or transacts business. See 15 U.S.C. 53(b). However, actions filed or pending in other districts may be susceptible to arguments in favor of transferring venue to the district where the debtor's bankruptcy case is pending. Also, appearances by regulators before the bankruptcy court can create a risk of submitting the regulator to the bankruptcy court's jurisdiction. *In re Financial News Network Inc.*, 126 B.R. at 160-61 (upholding bankruptcy court order requiring regulators to bring their injunction action in bankruptcy court — subject to any right to withdraw reference — when regulators' actions submitted them to court's jurisdiction).

Notably, the code requires withdrawal of the reference from the bankruptcy court in cases that would require a judge to engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes. *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991); see also *United States Gypsum Co. v. National Gypsum Co. (In re National Gypsum Co.)*, 145 B.R. 539, 541 (N.D. Texas 1992).

In time-sensitive bankruptcy sales, HSR adds complexity to the sale process. Parties should devise a strategy to satisfy antitrust reporting requirements under HSR and maximize strategic advantages provided under the code, including the reduced waiting period for antitrust approval.

Tye C. Hancock and Rhett G. Campbell are partners, and Millie Sall is counsel, in the creditors' rights and corporate reorganization section of the Houston office of Thompson & Knight. Their practices focus on business bankruptcy and insolvency-related matters.