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"NAKED" SECTION 363 SALES IN RESTRUCTURINGS OF LIFE SCIENCES COMPANIES MAY MAXIMIZE VALUE

While a stalking horse bidder can effectively set a price floor and provide structure for a section 363 sale process, a stalking horse is not right in all cases, in particular in industries and situations where price discovery is difficult and where the range of value from buyers is particularly wide and buyer-dependent. A recent trend of "naked" section 363 sales shows that stakeholders should not take a one-size-fits-all approach and may need to look beyond the standard playbook to maximize value.

By Ari B. Blaut and Benjamin S. Beller *

Large chapter 11 filings have increased in 2023 and 2024 from the historic lows of 2021 and 2022, with the rise primarily driven by a small handful of specific industry sectors (retail/consumer discretionary, healthcare/life sciences, and industrials) that comprised more than 70% of the chapter 11 cases in 2023. While the wave of retail and consumer discretionary filings has received the most focus from an industry-specific perspective, the biotech and life sciences industries have faced unprecedented distress during that period, leading to all-time highs in the industry for chapter 11 filings.

As those companies have gone through the chapter 11 process, one trend has been the increasing frequency of "naked" section 363 sales — where the debtor company enters chapter 11 without a stalking horse bid in place. In fact, many of the life sciences companies filing for chapter 11 in 2023 and 2024 that pursued a third-party sale did not have a stalking horse bidder at the time of the filing, including NanoString, Athenex, Sientra, Invitae, Impel, and the recently filed Gritstone bio (filed on October 10, 2024).

One of the key factors contributing to this trend is that distressed life sciences companies are likely to have significant capital needs not just to emerge from bankruptcy, but to fund product development and commercialization costs and clinical trials. These expenses are non-discretionary. This makes price discovery difficult for both bidders and debtors (and their stakeholders). Bidders are fearful of having too large of a cover bid and, as a result, have tended to underbid during the stalking horse bid process. Debtors may determine that these bids do not justify the benefits of giving a low bidder stalking horse protections as well as anchoring the auction process to a low cover bid.

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