

**Presentation to the
Business Law Section of the
Alaska Bar Association**

**Buying Distressed Assets
Out of Bankruptcy**



Presented by
David Levant

January 17, 2012

TOP RANKED
CHAMBERS
USA
2011

Stoel Rives LLP

RANKED IN
CHAMBERS
GLOBAL
2011

Stoel Rives LLP

Stoel Rives is pleased to announce that it has received a nomination for the prestigious *USA Awards for Excellence* in **Energy Projects: Power including Renewables**, as well as *national rankings* for its **Renewables and Alternative Energy practice** from *Chambers USA* and *Chambers Global*.

Chambers and Partners annual rankings are a result of extensive independent research conducted among in-house counsel, corporate executives and leading attorneys.

David Levant is the Managing Partner of the Seattle office of Stoel Rives LLP. He joined Stoel Rives in 1990 after three years practicing corporate law with Sullivan & Cromwell in New York City and London. David particularly focuses on the representation of parties to bankruptcy and pre-bankruptcy transactions and the preparation of opinion letters. A graduate of the University of Chicago (AB 1983) and the University of California, Berkeley's Boalt Hall School of Law (JD 1987), David is a member of the New York and Washington State Bars and is admitted to practice in the U.S. District Courts for the Western and Eastern Districts of Washington, the Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court, where he successfully petitioned the Court to review the Ninth Circuit's decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership (In re Bonner Mall Partnership)*, 2 F.3d 899 (9th Cir. 1993). He can be reached at (206) 386-7601 or dblevant@stoel.com.

3

Overview

- I. Advantages of Buying Assets Out of Bankruptcy
- II. The Bankruptcy Sale Process
- III. Differences Between Bankruptcy and Non-Bankruptcy Asset Sales
- IV. Tactical Considerations in Bankruptcy Sales

I. ADVANTAGES OF BUYING ASSETS OUT OF BANKRUPTCY

- Bankruptcy *Code* Protections
- Bankruptcy *Court* Protections

Bankruptcy Code Protections

- **The “Free and Clear” Power (Section 363(f))**
- **Assumption and Assignment of Executory Contracts and Unexpired Leases; Overriding Consent Requirements (Section 365(f)(1))**
- **Finality of Sale (Mootness of Appeals) (Section 363(m))**

Bankruptcy *Court* Protections

- **Court Approval**
- **Protection from Successor Liability Claims**
- **Injunctive Relief and Preclusive Factual Findings**
- **Self-Executing Features of the Sale Order**

II. THE BANKRUPTCY SALE PROCESS

- One Step Sales & Simple Auctions
- The Two-Step “Stalking Horse” Sale Process
- Break-Up Fees & Expense Reimbursement
- Bidding Procedures
- The Auction
- The Sale Hearing
- The Sale Order
- Closing the Sale

8

The Two-Step Sale Process

- **The Need for Court Approval (Section 363(b))**
- **How the Need for Court Approval Leads to Auctions**
- **How Auctions Lead to a Two-Step Process**
- **Circumstances for a Single-Step Sale or Traditional Auction**

Break-Up Fees & Expense Reimbursement

- **Rationale for Break-Up Fees and Expense Reimbursements**
- **Requirement that a Fee or Reimbursement is Needed to Obtain Stalking Horse Bid**
- **Size of Break-Up Fee**
- **Requirements for Payment of Fee**

Bidding Procedures

- Bidder Qualifications
- Bid Requirements
- Minimum Overbid and Bid Increments
- Timing
- Structuring the Auction
- Modification and Waiver of Procedures

The Auction

- **Sealed Bid versus Open Auction**
- **In Court or Out**
- **Unpredictability**
- **US v. Canadian Approaches to Procedures**

The Sale Hearing

- Reopening the Auction
- Presenting Evidence in Support of Findings
- Objecting to the Sale

The Sale Order

- **A Critical Document**
- **Exhibit to the Purchase Agreement**
- **Findings of Fact & Conclusions of Law**
- **Presenting Evidence at the Sale Hearing**

Closing the Sale

- **Pre-Closing Due Diligence**
- **Appeals, Mootness & Good Faith**
- **The Importance of an Adequate Record**

III. DIFFERENCES BETWEEN BANKRUPTCY AND NON-BANKRUPTCY ASSET SALES

- **The Sale Agreement: Differences from Non-Bankruptcy APAs**
- **Limited Confidentiality**
- **No Lock-Ups: Unavoidable Risk of Overbid**
- **Cooperation versus Collusion**
- **Conditions to Closing**
- **Non-Survival of Reps and Warranties**

16

IV. TACTICAL CONSIDERATIONS IN BANKRUPTCY ASSET SALES

- **The Auction to be the Stalking Horse Bidder**
- **Structuring the Auction Sale**
- **Closing the Sale**

The Auction to be the Stalking Horse Bidder

- Reasons for being the Stalking Horse
- Drawbacks of being the Stalking Horse

Structuring the Auction Sale

- **In Court or Out**
- **Open Versus Closed Process**
- **Structuring or Prohibiting Joint Bids**
- **Creating a Record of the Extra-Judicial Auction**
- **Sale Under a Plan of Reorganization**

19

Closing the Sale

- **Waiving the 14-Day Waiting Period**
- **Advantages of a Fast Closing**

Questions?

21