

Client Alert

May 2014

Credit Bidding Alive and Well in Delaware: Follow-Up on *Fisker Automotive*

In January, we first [wrote](#) about the *Fisker Automotive* case.¹ Recall that in *Fisker*, Judge Kevin Gross of the United States Bankruptcy Court for the District of Delaware capped Hybrid Tech Holdings' credit bid for Fisker's hybrid electric vehicle company at \$25 million. The Judge imposed this cap even though the face amount of Hybrid's debt was \$170 million. \$25 million was the price Hybrid paid for the debt at an auction conducted by the U.S. Department of Energy two months earlier. Judge Gross found "cause" to cap the credit bid at Hybrid's purchase price.

Much has been written over whether Judge Gross' decision changed the rules of credit bidding. Our view is that his decision has not. To be clear: credit bidding is alive and well and Delaware judges, Judge Gross included, have approved credit bids post-*Fisker* as they did prior. For example, in the *Event Rentals, Inc.* bankruptcy case pending in Delaware, Judge Peter J. Walsh approved a \$124 million stalking horse credit bid.² Demonstrating that credit bidding does not *per se* chill other bids, in that case, a cash bidder overbid the credit bid stalking horse bidder for the sale of the debtors' business. Judge Walsh also approved a \$5 million stalking horse credit bid in the *Restora Healthcare* bankruptcy case,³ even though the creditors' committee cited to *Fisker* in its objection to the bid procedures. Meanwhile, Judge Christopher S. Sontchi recently approved a credit bid in excess of \$30 million in the *Gridway Energy Holdings* chapter 11 case.⁴ In yet another example, in the *Tuscany International Holdings* case,⁵ Judge Gross just approved a credit bid of up to \$155 million.

Another prime example is our firm's own experience before Judge Gross approximately one month following his *Fisker* decision. Olshan represents

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¹ *In re Fisker Automotive Holdings, Inc.*, Case No. 13-13087 (KG) (Bankr. D. Del.).

² *In re Event Rentals, Inc.*, Case No. 14-10282 (PJW) (Bankr. D. Del.).

³ *In re Restora Healthcare Holdings, LLC*, Case No. 14-10367 (PJW) (Bankr. D. Del.).

⁴ *In re Gridway Energy Holdings, Inc.*, Case No. 14-10833 (CSS) (Bankr. D. Del.).

⁵ *In re Tuscany Int'l Holdings (U.S.A.) Ltd.*, Case No. 14-10193 (KG) (Bankr. D. Del.).

the debtors in the *Fox & Hound* and *Champps* chapter 11 cases currently pending before Judge Gross.⁶ In *Fox & Hound*, Judge Gross approved a purchase of the debtors' business to their second lien holder in a private sale (meaning no court-conducted auction). The purchase price included a credit bid by the second lien lender.

In short, *Fisker* did not change the playing field. It did not create or signal new law. It is not a case that stands for the proposition, as some have asserted, that the potential of chilling bidding is in of itself a rationale for disallowing a credit bid. In *Fisker*, as an initial matter, the Court took pains to signal that its decision was *not* precedential in any event. Second, the Court merely applied the Bankruptcy Code statute that allows courts to deny credit bids "for cause." The critically important "cause" for the cap in *Fisker* was not based on inequitable conduct but primarily because the extent of Hybrid's security interest (i.e., which of Fisker's assets were covered by a properly perfected lien) was not readily ascertainable and indeed, was challenged by the creditors' committee. Also significant, it appears that the parties in *Fisker* were asking the Court to make a decision on an expedited (perhaps too expedited) timetable for the auction.

The essence of the *Fisker* case is the unremarkable proposition that a Bankruptcy Court will deny a credit bid where the extent and validity of the lien behind the bid was in dispute. Simply said, you cannot credit bid a lien on widgets if you do not have a lien on those widgets or cannot, prior to the auction, establish the validity of the lien being used as currency. This is the essence of credit bidding and the Court correctly capped the credit bid where, in the Court's words "[t]he law leaves no doubt that the holder of a lien the validity of which has not been determined, as here, may not bid its lien."⁷

Hybrid's appeal was dismissed in February by the District Court as being "interlocutory," or premature. According to the District Court, not until after the Bankruptcy Court determined the value of Hybrid's liens could Hybrid appeal. The District Court further suggested that Hybrid could have protected itself by bidding cash pending the outcome of a trial on the validity of its liens, with cash returned should the Court rule in its favor.

The lesson from *Fisker* appears to be less about whether credit bidding is allowed — it is — and more about making sure that, before going to a bankruptcy auction, a credit bidder is able to demonstrate the extent and

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⁶ *In re F&H Acquisition Corp.*, Case No. 13-13220 (KG) (Bankr. D. Del.).

⁷ The Court also stated it could not make the necessary determination that a sale would be for "fair value," because Judge Gross was not in a position to sanction the fairness of the Department of Energy auction, because the parties, in his view, unnecessarily rushed him to make a determination and because the parties stipulated that a third party supported by the creditors' committee, Wanxiang, appeared ready, willing and able to make a strong bid above Hybrid's \$25 million purchase price.

validity of the liens it is credit bidding. A more subtle lesson may be for parties to ensure that the timetable for the auction process is not so expedited as to preclude the lender from having its liens “blessed” prior to the auction.

In short, as noted above, there are several post-*Fisker* cases in Delaware that have continued the long-standing precedent of permitting credit bidding. The recent *Event Rentals* case illustrates two important points: first, credit bidding is alive and well in Delaware, and second, and perhaps more importantly, the mere presence of a credit bid does not chill bidding when the assets being sold have value greater than the credit bid (or lien) amount.

For more information, please contact the Olshan attorney with whom you work regularly or the attorneys listed below.

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