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Bankruptcy Topics for the Real Estate Lawyer

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BIOGRAPHICAL INFORMATION

Michael D. Rubenstein is a shareholder in the Houston office of Liskow & Lewis, where he practices in the areas of business bankruptcy, business litigation, and criminal law. He is admitted to practice in both Texas and Louisiana. He routinely lectures on a variety of bankruptcy related topics. He is a member of the American Law Institute and is board certified in business bankruptcy law by the American Board of Certification. Prior to joining Liskow & Lewis, he served as a law clerk to Hon. Edith Brown Clement, U.S. District Court for the Eastern District of Louisiana. He received his undergraduate and law degrees from Tulane University, where he was a Managing Editor of The Tulane Law Review and a member of the Order of the Coif.

One of the most powerful tools granted by the United States Bankruptcy Code is the ability to sell assets free and clear pursuant to Section 363. This paper will provide an overview of the statutory framework for such asset sales and will highlight the potential pitfalls associated with these sales.

I. THE BASIC STATUTORY FRAMEWORK

Section 363 (b) of the Code sets forth the rights and powers of the trustee with respect to the sale, use, or other disposition of property of the estate:

(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

In general, the Code authorizes the trustee to sell, lease, or use property of the estate in ordinary course of business without court order. As to dispositions outside of the ordinary course of business, the trustee must file a motion with the bankruptcy court, provide notice to interested parties and an opportunity for them to be heard, and obtain a court order authorizing the sale before proceeding.

A. Property of the Estate

In order to properly understand the import of Section 363, it is necessary to first discuss the concept of property of the estate. While this concept could fill many law review articles, it is sufficient for purposes of Section 363 to note that the commencement of a bankruptcy case creates an estate comprised of all of the debtor's property, wherever located and by whomever held. The estate includes all legal or equitable interests of the debtor in property as of the commencement of the case. The trustee may, pursuant to Section 363, sell any property of the estate, but, to the extent that there is a question as to ownership of the property, the Court must determine ownership before authorizing the sale.

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