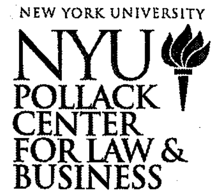

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Bidding Procedures — Stalking-Horse Protections and Collusion

Richard G. Mason*
Saish R. Setty

Wachtell, Lipton, Rosen & Katz
New York, New York

*Mr. Mason is a Partner, and Mr. Setty is an Associate, in the law firm of Wachtell, Lipton, Rosen & Katz. The views expressed are those of the authors only, and not those of the Firm or its clients.

I. Introduction

In recent years, Chapter 11 cases have tended to move away from traditional restructurings, wherein the debtor's operations and business are fixed and debt obligations are adjusted pursuant to a Chapter 11 plan, and toward a sale of the business under Section 363 of the Bankruptcy Code. There are multiple reasons for this trend, including:

1. An eighteen-month limit on the debtor's exclusive period for filing a Chapter 11 plan;
2. The prevalence of secured debt, which limits the debtor's DIP financing alternatives;
3. The presence of hedge funds as debtholders who may be more interested in, and structurally suited for, quick sales of the debtor rather than a long-term restructuring; and
4. The increasing sophistication of strategic and financial purchasers who are less concerned about the "taint" of bankruptcy on the debtor's assets.

Thus, while traditional business reorganizations have by no means become a thing of the past, at the margin, debtors today have less time to spend in Chapter 11, less money to finance their stay, and more potential bidders interested in acquiring their business.

In cases where the debtor's assets are to be sold, a competitive auction allows the debtor and its creditors to test the market and obtain a sale price that is potentially higher than what could be obtained through other means. As the sale price must typically reflect the "highest and best offer," courts in Chapter 11 bankruptcy proceedings usually require an auction to be conducted as part of a sale under section 363.[1]

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[1] *In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010). *See, e.g.*, *In re GSC, Inc.*, 453 B.R. 132, 169 (Bankr. S.D.N.Y. 2011); *In re Atlanta Packaging Prods., Inc.*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988) ("It is a well-established prin-

Typically, the first part of a 363 sale process involves an agreement to sell to a stalking-horse bidder that is subject to (a) the receipt of better offers in the auction and (b) approval of the bidding procedures in the auction. The second part consists of the auction itself and a hearing to approve the final sale. This outline will discuss two particular aspects of these auctions, (i) protections afforded to stalking-horse bidders and (ii) collusion between bidders during the auction.

II. Stalking-Horse Protections

A. Stalking-Horse Bidders

The term "stalking-horse" bidder refers to a party to whom the debtor-in-possession agrees to sell assets in a court-supervised auction. Such agreements are exposed to better bids in the auction but serve a debtor's interests since, among other reasons, they set a floor price for the auction. Of course, the stalking-horse bidder is vulnerable to higher bids and may not be the winning bidder.[2]

As such, both sellers and purchasers are incentivized to agree to stalking-horse protections. To the purchaser, such protections offer compensation for fees and expenses incurred in connection with due diligence and negotiating the sales agreement, for their time and efforts, and for the risk of missing other opportunities while the bidding process is underway.[3] Additionally, without these protections, "bidders would be reluctant to make an initial bid for fear that their first bid will be shopped around for a higher bid from another bidder who would capitalize on the initial bidder's (*i.e.*, "stalking-horse's") due diligence."[4] Meanwhile, sellers are also inclined to offer

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ciple of bankruptcy law that the objective of bankruptcy rules and the trustee's duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.").

[2] *See, e.g.*, *In re SpecialtyChem Products Corp.*, 372 B.R. 434, 436 (E.D. Wis. 2007).

[3] *See In re APP Plus, Inc.*, 223 B.R. 870, 874 (Bankr. E.D.N.Y. 1998).

[4] *In re Hupp Indus., Inc.*, 140 B.R. 191, 194 (Bankr. N.D. Ohio 1992).

such protections as they may encourage initial bids at a time when there are no other competing bids, discourage bidding strategies that hold back competitive bids until the very end of the process, and help to negotiate a strong initial bid and floor price for the auction.[5] However, such protections must carefully balance these benefits with the prospect of having overly protective provisions chilling the bidding process.

As discussed below, common stalking-horse protections include (i) breakup fees, (ii) topping fees, (iii) lock-out agreements and (iv) other protections in the bidding process.

B. Breakup Fees

Breakup fees are those fees paid to a proposed purchaser by the seller if the transaction fails to be consummated for a number of reasons, including, acceptance of a higher bid.[6] Although breakup fees are established in the stalking-horse's sale agreement, the debtor's agreement to pay the fees is not binding until the court approves them, typically at a bid procedures hearing that is held on notice to creditors, third parties and the public; thus, the initial bidder could be vulnerable if another bidder emerges prior to the bid procedures hearing. While some courts have characterized such fees as "being concessions extracted by aggressive friendly bidders,"[7] others view them as compensation for a failed bid.[8] Nevertheless, although these fees are presumptively valid outside of bankruptcy, their validity is subject to scrutiny in bankruptcy sales and they must be specifically approved by the court.[9]

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[5] *See In re APP Plus, Inc.*, 223 B.R. at 874.
[6] *See id.*; *In re Integrated Res., Inc.*, 147 B.R. 650, 653 (S.D.N.Y. 1992).
[7] *In re Hupp Indus., Inc.*, 140 B.R. at 194.
[8] *In re Integrated Resources, Inc.*, 147 B.R. at 653.
[9] *Id.*

The type of scrutiny applied to breakup fees varies by jurisdiction.[10] While some courts rely on the business judgment standard of review, others have adopted a standard that looks to the best interests of the estate. Meanwhile, other courts subject breakup fees to an analysis under section 503(b) of the Bankruptcy Code.

1. Business Judgment Review

Jurisdictions that ascribe to this standard of review, including the Southern District of New York, apply the business judgment standard absent a "showing of bad faith, self-interest, or gross negligence."[11] These jurisdictions often espouse favorable views of breakup fees, even going so far as to suggest that because "the directors of a corporation have a duty to encourage bidding, breakup fees can be necessary to discharge the directors' duties to maximize value."[12]

These courts take a three-prong approach, looking to (1) the relationship of the parties who negotiated the fee and whether such negotiations were tainted by self-dealing or manipulation, (2) the fee's reasonableness in comparison to the total purchase price and (3) whether the fee chills or encourages bidding.[13]

In cases where the first prong is not satisfied and the transaction is tainted by self-dealing, some courts have suggested that fees "bear[ing] a reasonable relationship to the bidders' efforts" may nonetheless be approved.[14] Otherwise, approval of the fee is subject to the remaining two prongs. As to the second prong, breakup fees consisting of less than 3% of the purchase price

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[10] *See In re Hupp Indus., Inc.*, 140 B.R. at 194 ("One court considered such fees framed solely in the form of expense reimbursement for out-of-pocket expenses relating to costs incurred during a due diligence period, while another court allowed reasonable break-up fees wholly independent of the transaction costs.").
[11] *In re Integrated Res., Inc.*, 147 B.R. at 656.
[12] *Id.* at 659-60.
[13] *See, e.g.*, *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547, 552 (Bankr. S.D.N.Y. 1997); *In re Integrated Res., Inc.*, 147 B.R. at 657.
[14] *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. at 553.

are typically approved.[15] Meanwhile, in examining the third prong of this test, courts look to whether the breakup fee served a useful function, including whether the fee helped to attract or retain a potentially successful bid, whether it established a minimum bid for other bidders and if it attracted other bidders.[16] These are fairly lenient standards, as breakup fees would certainly encourage stalking-horse bidders in some way. As such, provided that the breakup fee encouraged bidding and was reasonable, it would likely be enforceable.[17]

2. Best Interests of the Estate

Other jurisdictions take a more exacting view of breakup fees and scrutinize the fees within the context of the whole bankruptcy, deferring not to the debtor's business judgment but looking to whether "the best interests of the debtor's estate, creditors and equity holders are furthered" by the fee.[18] These courts are critical of breakup fees and appear fairly reluctant to allow them—often finding that where sales had been marketed widely, a fee would do little to induce additional bidding and would instead act to chill bidding and divert resources away from the estate.[19] Other courts relying on this best interests analysis have also refused to approve fees without evidence of the purchaser's "time, effort, expense and risk"[20] to determine if the fee is justified and whether such fee "correlated to any transactional cost or expense incurred by the negotiating

[15] *See id.* (criticizes a breakup fee equal to 4.4% and notes that the purchase price used to make such calculation should "exclude from the value the monies which are to be generated from the debtors' own assets"); *In re Integrated Resources, Inc.*, 147 B.R. at 654 ("average break-up fee in the industry is 3.3 percent").
[16] *In re Integrated Res., Inc.*, 147 B.R. at 662-63.
[17] *Id.* at 659-60.
[18] *In re Tiara Motorcoach Corp.*, 212 B.R. 133, 137 (Bankr. N.D. Ind. 1997). *See also In re Am. W. Airlines, Inc.*, 166 B.R. at 912 (Bankr. D. Ariz. 1994).
[19] *In re Am. W. Airlines, Inc.*, 166 B.R. at 913 (finding that in this situation "payment of the contemplated break-up fee, in any amount, is not in the best interest of the estate, the creditors or the equity holders" while noting that reimbursement for expenses "are in the best interests of the estate" and would be approved.).
[20] *In re Tiara Motorcoach Corp.*, 212 B.R. at 138.

bidder."[21] As such, while expense reimbursement may be permitted under a best interests analysis, breakup fees must "make economic sense for all [parties] concerned."[22]

3. Breakup Fees as Administrative Expenses

Other jurisdictions have opted to subject breakup fees to scrutiny under the standards of section 503(b) of the Bankruptcy Code. The Third Circuit in particular has noted that:

> [W]e decline the invitation to develop a general common law of break-up fees. We instead consider whether any provision of the Bankruptcy Code, as it is currently written, authorizes the award of break-up fees and expenses to an unsuccessful bidder at the plan-based sale of a debtor's assets. . . . Further, claims that arise after the date on which the debtor petitioned for bankruptcy protection ("post-petition claims") are generally allowed, if at all, only as administrative expenses pursuant to 11 U.S.C. § 503. We, therefore, treat [the bidder]'s arguments as addressing whether it is entitled to receive break-up fees and expenses under that provision.[23]

As such, the Third Circuit requires stalking-horse bidders to justify breakup fees by "demonstrating that the costs and fees for which it seeks payment provided an actual benefit to the estate and that such costs and expenses were *necessary* to preserve the value of the estate assets."[24] Rele-

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[21] *In re Am. W. Airlines, Inc.*, 166 B.R. at 912-14.
[22] *Id.*
[23] *In re O'Brien Envtl. Energy, Inc.*, 181 F.3d 527, 532 (3d Cir. 1999). *See also In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010) ("We held that courts do not have the authority to create new ways to authorize the payment of fees from a bankruptcy estate, and the methods of recovering fees from an estate are limited to the procedures established by the Bankruptcy Code.").
[24] *In re O'Brien Envtl. Energy, Inc.*, 181 F.3d at 533 (emphasis added).

vant points of inquiry around this analysis are whether "the bidder would have bid even without the break-up fee" and if a fee was needed to ensure that the stalking-horse bidder would not drop out of the process.[25] As such, parties seeking approval of a breakup fee in the Third Circuit should do so as early as possible to avoid the impression that the fee was not a prerequisite to their bid.[26] Nevertheless, despite this high standard, the Third Circuit has suggested that it would approve a breakup fee commensurate with the costs incurred by the prospective purchaser in researching the value of the debtor if such research benefited the estate by providing other bidders with a valuation figure on which they could rely, thereby increasing the probability that the assets would sell for a price better reflecting their true worth.[27]

Meanwhile, other jurisdictions that examine breakup fees as administrative expenses under section 503 rely on multifactor tests. *In re Hupp Industries Inc.*[28] looked to the following seven factors:

> (1) Whether the fee requested correlates with a maximization of value to the debtor's estate; (2) Whether the underlying negotiated agreement is an arm's-length transaction between the debtor's estate and the negotiating acquirer; (3) Whether the principal secured creditors and the official creditors committee are supportive of the concession; (4) Whether the subject break-up fee constitutes a fair and reasonable percentage of the proposed purchase price; (5)

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[25] *In re Reliant Energy Channelview LP*, 594 F.3d at 206-08.
[26] *In re O'Brien Envtl. Energy, Inc.*, 181 F.3d at 537.
[27] *Id.* at 537. *See also In re Tropea*, 352 B.R. 766, 768 (Bankr. N.D. W.Va. 2006) (suggesting that a breakup fee would be allowed where a stalking-horse bidder fronted the debtor sums to cover its tax deficiency, thereby preventing a tax sale and foreclosure).
[28] 140 B.R. at 196. *See also* David H. Kleiman, Alternatives for Awarding Break-Up Fees to Stalking-Horse Bidders, AM. BANKR. INST. J., October 2010, at 26, 90.

> Whether the dollar amount of the break-up fee is so substantial that it provides a "chilling effect" on other potential bidders; (6) The existence of available safeguards beneficial to the debtor's estate; and (7) Whether there exists a substantial adverse impact upon unsecured creditors, where such creditors are in opposition to the break-up fee.

In addition, other courts have also considered whether "the unsuccessful bidder placed the estate property in a sales configuration mode to attract other bidders to the auction," inquiring into whether the stalking-horse's bid attracted other bidders and spurred an auction where there may have otherwise been none.[29] In relying on such multifactor inquiries, some courts have approved breakup fees as administrative expenses even where there was "no evidence . . . to decide if the amount of the break-up fee is reasonable or if the application properly accounted for the reasonable expenses incurred."[30]

4. Breakup Fees Overview

As the various standards of review described above illustrate, breakup fees in bankruptcy still occupy an area with muddled case law. For example, despite the Southern District of New York's reliance on the business judgment standard of review, at least one court within the district has also applied the administrative expense analysis to a breakup fee.[31] However, the court's scrutiny was still very deferential, finding that the fee was an actual and necessary cost merely by being "a component of what induced" the stalking-horse bidder to establish a floor bid.[32] As

[29] *In re Tama Beef Packing, Inc.*, 290 B.R. 90, 97 (B.A.P. 8th Cir. 2003).
[30] *Id.* at 98.
[31] *In re Fortunoff Fine Jewelry & Silverware, LLC*, 2008 WL 618983, *1 (Bankr. S.D.N.Y. Feb. 22, 2008).
[32] *Id.*

such, parties may be best served by focusing less on specific standards of review and more on recognizing which jurisdictions are generally deferential to breakup fees and which will subject such fees to more rigorous scrutiny.

C. Topping Fees

Unlike breakup fees, topping fees are not a fixed amount; rather, they are usually equal to a percentage of the difference between the winning bid and the stalking-horse's bid.[33] While there is limited case law on topping fees, courts typically subject such fees to analyses similar to those applied to breakup fees. One court even explicitly referred to the different standards applied to breakup fees and then combined those standards to review a topping fee.[34]

D. Lock-out Arrangements

Lock-out arrangements and no-shop clauses are protections where debtors agree not to solicit, initiate or encourage other offers from potential bidders.[35] Given the natural tendency of such procedures to greatly chill bidding, courts tend to look upon such provisions rather disfavorably.[36] Nevertheless, arrangements where debtors were prohibited from initiating, soliciting or

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[33] *In re APP Plus, Inc.*, 223 B.R. at 874.
[34] *Id.* at 875 ("Due to a dearth of cases dealing solely with topping fees and although the bankruptcy courts in Integrated Resources, Hupp Industries and America West were grappling with break-up fees, this Court has been guided by their analysis in determining whether to approve a Topping Fee in this case. That is to say, in addition to the three-part test enunciated in Integrated Resources, this Court has also analyzed whether the proposed Topping Fee is unduly burdensome to the estate in view of the specific facts and circumstances of this case and whether it is in the best interest of the bankruptcy estate, the creditors, and the equity holders.").
[35] *See In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. at 552; *In re Big Rivers Elec. Corp.*, 233 B.R. 726, 738 (W.D. Ky. 1998) (finding that "No-Shop Clauses, such as this one, which prohibit a debtor from fulfilling its fiduciary duties are per se illegal in Chapter 11 proceedings"), *aff'd*, 233 B.R. 739 (W.D. Ky. 1998).
[36] *Id. See also In re Metaldyne Corp.*, 409 B.R. 661, 670 (Bankr. S.D.N.Y. 2009) ("Bidder protections are granted when a bidder provides a floor for bidding by expending resources to conduct due diligence and allowing its bid to be shopped around for a higher offer.").

encouraging other offers for a limited period of time, namely, until the bid procedures were approved, have been permitted.[37]

E. Other Protections in the Bidding Process

Often, stalking-horse protections are built into the bidding procedures governing the auction process. Such protective procedures benefit stalking-horse bidders by exempting them from such requirements, allowing them greater information than other parties, or by creating procedures that inherently favor an initial bidder.

Some commonly used procedures include requiring:

- bidders to submit competing bids in advance of the auction and having such bids shared with the stalking-horse;
- bidders to bid on terms substantially identical to those of the stalking-horse's offer;
- substantial bid increments;[38]
- deposits from competing bidders;
- financial screening for bidders;
- confidentiality agreements; or

[37] *In re Nortel Networks Inc.*, 2011 WL 1661524 (Bankr. D. Del. May 2, 2011) (approving a stalking-horse arrangement where the debtors agreed to not "initiate, solicit, encourage or induce the submission or announcement" of any alternate offer until the bid procedures were approved).

[38] *E.g.*, *In re Hupp Indus., Inc.*, 140 B.R. at 195 (finding that the "proposed asset bid increment limitation in the amount of $300,000, however, is arbitrary and unreasonably high and otherwise has not been justified" where the total purchase price was approximately $4 million).

- bids to be evaluated in terms of net cash; that is, a requirement that bidders must exceed the stalking-horse's bid by at least the amount of any proposed breakup fee or topping fee.

Other forms of bid protection include DIP lenders' tying available financing to their bid—for example, by allowing acceleration of (or at least termination of additional funding under) the DIP facility if assets are sold to another party. Such an arrangement would be unusual, but it could be justified if, for example, the DIP lenders were providing ongoing financing to the debtor and have a reasonable concern about the viability of the debtor's business if another stalking-horse is selected. Another unique stalking-horse protection was used in Lehman Brothers' sale of its Neuberger Berman investment management unit. There, the debtor's proposed sale procedures allowed the stalking-horse bidder to solicit the consent of Neuberger Berman's customers to the proposed sale even though the stalking-horse bid was subject to higher and better offers. Still, despite the great advantage afforded to the stalking-horse, the court approved the procedure because customers had been fleeing Neuberger Berman until the stalking-horse bid was announced. Withdrawal of the stalking-horse bid, conditioned on approval of the procedures, would have destroyed value unless another bidder immediately stepped up.

III. Collusion

A. Overview of Section 363(n)

Bankruptcy courts will scrutinize any proposed section 363 transaction to ensure that the conduct of both the debtor and the proposed purchaser were in "good faith."[39] A finding of "good faith"

[39] *In re Chrysler LLC*, 576 F. 3d 108, 113 (2d Cir. 2009), *vacated as moot*, *Indiana State Police Pension Trust* v. *Chrysler LLC*, 130 S. Ct. 1015 (2009).

is crucial since it significantly reduces appellate review of a sale. Under section 363(m), so long as the acquisition is found to be in good faith and the sale order is not stayed pending appeal, a reversal or modification of the sale order on appeal will not, in most instances, affect the validity of the sale.[40] As such, 363(m) seeks to maximize the sales price by ensuring finality to bidders.[41]

A critical aspect of "good faith" is an inquiry into whether there was "collusion between the purchaser and other bidders or the trustee."[42] Collusive bidding is also explicitly prohibited by section 363(n), which allows a court to decline to approve a sale of assets where the "sale price was controlled by an agreement among potential bidders at such sale."[43] Additionally, it permits an approved sale to be avoided, or for damages to be obtained from a bidder, if a collusive agreement among bidders deprived the estate of value.[44] While section 363(n) also allows for punitive damages if a purchaser acted in willful disregard of its prohibitions, no reported decision has awarded such damages.

For conduct to violate 363(n), bidders entering into an agreement must do so with the intention of controlling the price of the asset—the purportedly collusive action must "control" rather than incidentally affect the sales price.[45] As such, agreements that have the unintended consequence of affecting the sales price would not constitute a violation of 363(n).[46]

[40] 11 U.S.C. § 363.
[41] *In re GSC, Inc.*, 453 B.R. at 180.
[42] *In re Gucci*, 126 F.3d 380, 390 (2d Cir. 1997).
[43] 11 U.S.C. § 363(n).
[44] 11 U.S.C. § 363(n). *See also In re Gucci*, 126 F.3d at 391.
[45] *See In re N.Y. Trap Rock Corp.*, 42 F.3d 747, 752-53 (2d Cir. 1994) (noting that "[t]he influence on the sale price must be an intended objective of the agreement, and not merely an unintended consequence," but finding that the collusion claim could be sustained where a bidder dropped out in exchange for sharing of marginal bid value).
[46] *In re N.Y. Trap Rock Corp.*, 42 F.3d at 752.

B. Procedures to Avoid Violating Section 363(n)

While violations of 363(n) have serious consequences, there are few cases interpreting the provision. Purchasers should act very cautiously when entering into arrangements with other bidders in connection with a possible asset purchase. For example, the existence of a group should be disclosed to the seller.[47] Even though full disclosure of a bidding agreement may not preclude a finding of improper collusion, a failure to disclose may prove fatal to an arrangement that may have otherwise survived section 363(n) scrutiny.[48] In particular, group members should avoid any agreement under which a member plans to withdraw or withhold its bid with the expectation that it will nonetheless share in the assets sold.[49]

C. Collaboration or Collusion?

It is fairly commonplace for potential bidders to bid jointly, and collaboration is often beneficial to the debtor—especially when a pool of assets is too large or too diverse to be of interest to any single bidder. A bid for only part of the assets in such a situation would be disfavored as the estate would be left with orphaned remains of lesser value.[50] Given the difficulties inherent in dis-

[47] *See In re GSC, Inc.*, 453 B.R. at 182-83.
[48] *See, e.g.*, *In re Colony Hill Assocs.*, 111 F.3d 269, 277 (2d Cir. 1997) ("Many courts ruling on challenges to a purchaser's good faith status have focused on whether the acts about which the appellant complained were disclosed to the bankruptcy court.... Although full disclosure to the bankruptcy court may not always neutralize conduct that would otherwise constitute bad faith, disclosure should certainly weigh heavily in a bankruptcy court's decision on that issue.").
[49] *See Boyer* v. *Gildea*, 374 B.R. 645, 660 (N.D. Ind. 2007) (in deciding whether the trustee put forth sufficient evidence for a claim under 363(n), the court noted that a reasonable trier of fact could infer collusion from the fact that one potential bidder did not submit a bid but purchased the assets from the highest bidder shortly after the sale).
[50] *See* Ilene Knable Gotts & Franco Castelli, *Special Antitrust Issues Raised by Private Equity Minority Investments*, The Threshold, Vol. III, No. 3 (Summer 2008), at 15-22.

tinguishing between collaboration and collusion, courts often turn to a fact-intensive examination that focuses on matters including the parties' motivation to join together in a bid.[51]

Further, without joint bidding, certain transactions may not even be able to occur. In these situations, it is unclear as to how courts will apply section 363(n). Factors likely to be considered include whether (i) the members of the bidding group have the financial ability to bid individually for the entire business, (ii) the members of the bidding group only have a strategic interest in select assets regardless of their financial capability, (iii) the bidding group's bid is higher than what any individual bid by the members would have been, (iv) there are other competitors bidding (that is, whether the group consists of all parties interested in the assets), and (v) whether the group timely communicated its desire to bid together and its rationale for forming itself to the relevant interested parties.[52]

The sale of Nortel Network's portfolio of over 6,000 mobile telecommunications patents through a 363 sale is a prime example of the benefits of collaborative bidding and the use of appropriate protections against collusion. Given that intellectual property portfolios are often owned by consortiums with members cross-licensing patents to one another, the auction procedures expressly contemplated group bids. The procedures allowed for group bids, provided that bidders disclose any and all relationships with other bidders and expressly affirm that they had not engaged in any collusive behavior. Over the course of the Nortel auction, individual bidders who had dropped out earlier would later resurface as part of a larger group. Ultimately, the group that won the auction had placed a bid larger than what any individual member of the group would have been

[51] *See In re Edwards*, 228 B.R. 552, 565 (Bankr. E.D. Pa. 1998) (agreement between joint bidders not intended to control price).
[52] *See* Ilene Knable Gotts & Franco Castelli, *Special Antitrust Issues Raised by Private Equity Minority Investments*, The Threshold, Vol. III, No. 3 (Summer 2008), at 15-22.

willing to pay on its own. As such, the auction in Nortel was able to capture the benefits of collaboration while avoiding the risks of violating 363(n).