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Purchasing Oil and Gas Assets in Bankruptcy

Presented by:

Camisha L. Simmons, Simmons Legal PLLC, Dallas, TX



Simmons Legal
PLLC





Presenter

- ✦ Camisha L. Simmons is the managing member and founder of Simmons Legal PLLC, a certified woman-owned, minority-owned and veteran-owned transactional and civil dispute resolution and litigation law firm dedicated to assisting debtors, creditors and other parties in protecting their assets in the event of an insolvency, bankruptcy, distressed debt workout, financing transaction and/or litigation matter.
- ✦ She founded the firm after practicing in New York and Dallas for close to 8 years as an associate attorney for the global law firms of Weil, Gotshal & Manges LLP, DLA Piper and Norton Rose Fulbright.
- ✦ From 2006-2007, Ms. Simmons was a law clerk to the Honorable Mary F. Walrath, Judge of the United States Bankruptcy Court, District of Delaware.
- ✦ In 2013, Texas Lawyer magazine named her to its inaugural list of Legal Leaders on the Rise. She has also been named a *Texas Rising Star* for three consecutive years (2014 through 2016) and a *New York Metro Rising Star* (2016) by *SuperLawyers®*, a Thomson Reuters rating service. Additionally, in 2015, the National Black Lawyers named her a “Top 40 Under 40” attorney.
- ✦ She holds a J.D., *magna cum laude* and an M.B.A. from Texas Tech University, an M.Ed. from the University of Maryland, College Park and a B.B.A. from Campbell University. Prior to beginning her legal career, she served on active duty in the United States Army from 1999 to 2003.



Disclaimer

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Introduction

† Current State of the Oil and Gas Market

- ⑩ 100s of bankruptcies in last few years
- ✦ Moderate recent price increases
- ✦ U.S. policy to increase domestic production of oil and gas
- ✦ Uncertainty: price, global trend to seek cleaner energy alternatives and decrease dependency on fossil fuels, move to electric powered vehicles
- ✦ Opportunity presented by uncertain oil and gas market

† Two Primary Avenues for Assets Purchases in Bankruptcy

- ⑩ Section 363 Sale Process
- ⑩ Chapter 11 Plan Process in Accordance with Bankruptcy Code Section 1129

† Debtor's or trustee's goal in selling assets in bankruptcy is to maximize value for creditors of bankruptcy estate



Examples of Assets Saleable in Bankruptcy

- ⑩ Real property (land, buildings, etc.)
- ⑩ Equipment and Fixtures
- ⑩ Interests in Contracts, Leases, and Claims
- ⑩ Intellectual Property
- ⑩ Equity Interests
- ⑩ Accounts Receivable



Section 363 Sale Process

⑩ Section 363 of the Bankruptcy Code

- ✦ Authorizes debtor or trustee to sell some or substantially all of the company's or individual's assets *outside the ordinary course of business*
- ✦ Note: Outside of ordinary course of business: debtor in bankruptcy may conduct business as usual, so, for instance, an E&P company's selling of oil and gas through regular operations would not need court approval under section 363
- ✦ Assets sold free and clear of liens, claims and encumbrances, with a few exceptions
 - Ownership obligations continue
 - Plugging and abandonment, site restoration and environmental liability attached to assets continue
 - Generally, obtain assignment of contracts free of non-assignability clauses



Section 363 Sale Process

⑩ Section 363 Sales are by Motion

- ✦ Debtor or trustee files a motion to obtain court approval of the sale and procedure for obtaining bids from prospective purchasers on the assets being sold
- ✦ Creditors and other parties in interest must receive notice of the sale and an opportunity to request a hearing on the motion
- ✦ In determining whether to approve an asset sale, the court will defer to the debtor's or trustee's business judgment and, generally, will approve the sale if (i) all Bankruptcy Code section 363 provisions are followed; (ii) the winning bid is considered fair; and (iii) the sale is in the best interests of the bankruptcy estate and creditors of the bankruptcy estate
- ✦ Obtaining sale approval by motion is faster than the rigorous plan approval process



Section 363 Sale Process: Marketing the Assets and Securing a Stalking Horse Bidder

- ⑩ In medium and large company bankruptcies, the debtor will engage an investment banker to market the assets for sale before or after the bankruptcy case is filed
- ⑩ Prospective purchasers will have a chance to conduct due diligence before submitting a bid
- ⑩ The debtor will try to obtain a stalking horse bidder to put up the first initial opening bid for which other subsequent bids will be measured
 - ✦ Debtor will put together an agreeable proposed asset purchase agreement with stalking horse bidder
 - ✦ Stalking horse bidder is provided protections such as expense reimbursement for its due diligence efforts and a breakup fee in case the stalking horse's bid is not the winning bid
 - ✦ Break-up fees are usually capped at no more than 4% of the purchase price



Section 363 Sale Process: The Bidding Process

- ⑩ After bidding procedures are approved by the court and, in many cases, a stalking horse bidder is obtained, qualified bidders may submit competing bids for the assets
- ⑩ If qualified bids in addition to the stalking horse bid are received, an auction will be conducted
- ⑩ A secured creditor may “credit bid” up to the value of the collateral securing the debt.
 - ✦ For example, if a debtor proposes to sell assets for \$12 million, and a secured creditor is owed \$10 million and the value of its collateral is \$8 million, then the secured creditor could put up \$4 million in cash and credit bid the remaining \$8 million of the purchase price
- ⑩ Once a winning bidder (highest and best bid) is chosen, the bankruptcy court will hold a hearing to approve the auction results and enter a sale order approving the sale to the buyer



Sales Under a Chapter 11 Plan

- ⑩ If the debtor is selling substantially all of its assets, some courts will not allow the debtor to sell the assets under a section 363 motion process and instead will require disposal of the assets under a chapter 11 plan pursuant to sections 1123 and 1129 of the Bankruptcy Code
- ⑩ Plan process more time consuming and rigorous than section 363 motion process
 - ✦ May shorten process by negotiating the sale and plan before the bankruptcy filing
- ⑩ If the debtor is selling substantially all of its assets in bankruptcy, the debtor will, most likely, still need to conduct a marketing and bidding process to obtain the highest and best bid



Sales Under a Chapter 11 Plan

- ⑩ Differs from section 363 sales process: plan must comply with all requirements of section 1129 of the Bankruptcy Code and creditors may vote to accept or reject the plan
 - ✦ Plan will not be confirmed unless sufficient votes in favor of the plan are received and all section 1129 plan confirmation requirements are met
 - ✦ Acceptances of more than half the number of creditors voting for the plan and at least 2/3 in amount of claims of voting creditors is required for plan approval



Special Considerations

- ⑩ Purchaser should ensure that protective provisions are included in the Court's sale order, purchase agreement and other transaction documents to minimize successor liability risk
- ⑩ Consider having debtor share or cover any known environmental liability costs
- ⑩ For geothermal operations, determine if you need to purchase oil and gas lease interest
- ⑩ Will you need a separate lease for geothermal lease operations given oil and gas lease may not cover exploration and drilling for geothermal energy purposes?
- ⑩ Do you need to purchase intellectual property related to technologies used in exploration and production operations?



Special Considerations

- ⑩ Section 365 of the Bankruptcy Code allows a debtor to assume and assign or reject executory contracts and unexpired leases
 - ✦ A legal analysis of the nature of an oil and gas lease and other agreements must be conducted to determine if assumption and assignment is required
 - ✦ If assumption and assignment is required, debtor must cure existing defaults under the agreement and provide the counterparty adequate assurance of future performance

 - ⑩ May face issues with regulatory bodies during sale process
 - ✦ Consent to assignment of leases may be required
 - ✦ Federal government may intervene if federal land and leases are involved
 - ✦ Government agencies responsible for environmental liabilities may intervene
 - ✦ Intervention of other state and federal regulatory bodies, such as Texas Railroad Commission
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How to Find Purchase Opportunities

- † Make friends with investment bankers and financial advisors that assist distressed oil and gas companies, such as Houston based Simmons & Company International (acquired by Piper Jaffray & Co.)
- † Subscribe to a newsletter service that provides links to bankruptcy news articles and lists of recent bankruptcy filings, such as The Daily Bankruptcy News service





Questions?



Contact Me



Camisha L. Simmons
Managing Member
Simmons Legal PLLC

E: camisha@simmonslegal.solutions
P: +1 214-643-6192