

Newman, David W. (USTP)

From: Newman, David W. (USTP)
Sent: Tuesday, July 22, 2014 10:18 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: Bankruptcy Estate Asset Sales

Dear Trustees,

I appreciate all your efforts to identify and timely liquidate assets for the benefit of creditors. A few reminders:

1. All sales require prior notice pursuant to Fed. R. Bankr. P. 6004. This is true whether you are selling to a third party or to the debtor, and regardless of the dollar amount. (Notice is not required for a sale in the ordinary course of business, but that exception is generally available only if you have obtained an order to operate the debtor's business, and the business ordinarily includes sale of property.)

2. All sale notices must provide adequate information, as outlined in Rule 6004 and in the *Handbook*. The *Handbook* (pp. 4-14 and 4-15) states that the following information must be included in the notice:

Type of sale (private, auction, etc.);

Location, date, and time of public sale;

Description of assets;

Terms and conditions of sale;

Factors used to establish value (appraisal, book value, etc.) in a private sale;

Procedure and time period for filing objections;

Amount of liens and identity of lien holders; and

In a private sale, identity of purchaser and relationship, if any, to any creditor or party in interest.

If the sale includes personally identifiable information under sections 363(b)(1)(A) or (B), the notice shall include a statement whether the sale is consistent with a policy prohibiting the transfer of the information. *See Handbook* Chapter 4.C.9.f. for guidelines that apply for motions for sale of personally identifiable information.

3. The sale of stock or other marketable securities by the trustee requires notice. In some instances, when the bankruptcy estate includes a small amount of publicly traded stock, the trustee has entered into an arrangement with the debtor where the debtor liquidates the stock and turns over the proceeds to the trustee. Without passing on the propriety of such an arrangement, at a minimum it requires notice and opportunity for hearing, and should clearly identify the number of shares, the current market price, the estimated transaction costs, and the estimated net proceeds to be received. It should also clearly advise whether the debtor will liquidate the stock on behalf of the estate, whether a broker will be compensated, whether a

broker has been employed, etc. (If the debtor's broker will be compensated but not employed, your duty of candor to the tribunal militates in favor disclosing this. If you are asking for an order authorizing this arrangement, you should make it clear to the court whether the broker will be employed by the estate. If you don't believe the Judge will approve an arrangement where the broker will not be employed but paid, that is all the more reason to disclose it.) As with all asset liquidations, Trustees should be aware of, and disclose whether there could be tax ramifications (To the debtor or the estate. If the Debtor is liquidating the stock, it will likely affect his or her tax liability. The Debtor may receive a 1099, etc. Fairness dictates you give the Debtor fair warning that there could be some impact on his or her tax liability. Of course, you are not required to give a tax opinion.) and you should ensure that income taxes are not withheld from the sale proceeds.

4. Reports of sale – whether the sale is public or private – are to be filed within 30 days after the sale.
5. The *Handbook* (p. 4-22) provides that auctioneers may not deduct their commissions and expenses from the sales proceeds “unless it is specifically authorized by order of the court. The order authorizing the employment must specify the percentage fee to be charged by the auctioneer and may authorize the deduction of the commissions and costs of sale from the sale proceeds, with the effect of the auctioneer remitting the net sales proceeds to the trustee (emphasis added).” If you intend to allow your auctioneers to deduct their commission and/or expenses, it is not sufficient to include this provision in your auctioneer agreement – you must also include it in the order authorizing the employment of the auctioneer.

Thank you for your attention to these matters. Please contact me if you have questions.

Respectfully,

David W. Newman

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