Untimely Bidding in Bankruptcy Auctions

By Vincent S.J. Buccola, Jeffrey R. Dutson and W. Austin Jowers[*]

I. Introduction

Much of chapter 11 practice today is directed toward generating an orderly and value-maximizing sale process, whether conducted under section 363 of the Bankruptcy Code or pursuant to the terms of a chapter 11 plan. It follows that few issues are more worthy of careful consideration than the terms on which these sales take place.[1] In this article, we document and opine on a recent phenomenon in the auction context—namely, the consideration by a bankruptcy judge of an upset bid submitted after the auction has been concluded by the debtor.

It will always be tempting to accept a late topping bid. Bankruptcy judges generally should and do use their discretion to maximize the value of the estate's assets.[2] And by definition, a late topping bid promises to increase creditor recoveries in the case at hand. Nevertheless, we argue, bankruptcy judges should reject untimely bids except when an auction has been conducted in a manner inconsistent with the bidding procedures order. An auction's efficacy depends on potential buyers investing in costly information about the debtor's assets and investing significant time, money, and resources in pursuit of those assets. The prospect of untimely bidding discourages precisely that.

Part I documents the phenomenon and frames the issues a bankruptcy court is likely to confront. Part II assesses the merits. Although our argument is directed specifically against the practice of reopening auctions, our reasoning suggests that practitioners and bankruptcy judges might do well to consider sealed-bid auctions in some instances.

II. Identifying the Trend

The goal of any debtor selling its assets (and the goal of the court overseeing such a sale) should be to conduct an orderly process that maximizes the value of its estate and provides for the largest recovery possible for its stakeholders. An auction with multiple competing bidders is usually the best way to maximize value. Thoughtful restructuring practitioners will carefully structure the auction rules and procedures in an effort to encourage active and robust bidding among competing bidders so that no value is left on the table.

A debtor will also typically seek court approval of its auction procedures

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[*]Buccola is Assistant Professor, The Wharton School of the University of Pennsylvania; Dutson is a Senior Associate at King & Spalding LLP; Jowers is a Partner at King & Spalding LLP. This article does not express the views or opinions of King & Spalding LLP. The views and opinions expressed are solely those of the authors.

in the form of a "bidding procedures order," which sets forth the rules that a bidder must follow in order to participate in the auction. These rules often include: the deadline and process for submitting a competing asset purchase agreement; the minimum amount of each topping bid; and the amount and type of any bid protections provided to the "stalking horse" bidder. The bidding procedures order will set the date of the auction and the date of the court hearing to approve the winning bid and will usually contain language expressly stating that all bidding will be concluded at the auction and there will be no further bidding at the approval hearing.

A debtor could conceivably conduct an auction without seeking entry of a bidding procedures order, but having the rules of the auction established pursuant to a transparent process overseen by the bankruptcy court and having the rules established by entry of a court order is an advantage to the section 363 sale process and one that buyers and other parties usually require. Notwithstanding good-faith efforts to bring order and transparency to the process, bankruptcy auctions can be contentious and chaotic, with competing bidders vying for control of the debtor's assets and stakeholders asserting different (and sometimes divergent) interests. When the dust settles and the auction concludes, the debtor must determine, in the exercise of its business judgment, the highest or best bid for its assets and then seek final court approval of the proposed transaction.

But what happens if, shortly after an auction has concluded, someone other than the prevailing bidder makes an even higher or better offer to purchase the debtor's assets? Should the bankruptcy court order the auction reopened? Or do competing concerns require turning down a superior offer? Bankruptcy judges have confronted these questions in three recent cases: *In re Allied Systems Holdings, Inc.*;[3] *In re Western Biomass Energy LLC*;[4] and *In re North Texas Bancshares of Delaware, Inc. and North Texas Bancshares, Inc.*[5]

In re Allied Systems Holdings, Inc.

Allied Systems Holdings and its subsidiaries ("Allied")—providers of logistics, distribution and transportation services to the automotive industry—filed voluntary chapter 11 petitions on May 17, 2012. Two bidders participated in the *Allied* auction conducted on August 14 and 15, 2013: Jack Cooper Holdings Corp. ("Jack Cooper") and a joint venture composed of BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 LTD, and Spectrum Investment Partners LP (collectively "BDS").[6]

BDS initially submitted a cash bid of approximately $45 million; Jack Cooper's initial cash bid was $95 million.[7] At the auction, BDS, as the "required lenders" under Allied's first lien credit agreement, restructured its bid in a manner that Jack Cooper alleged was inconsistent with the bidding procedures and contrary to the interests of Allied's stakeholders.[8] After a few rounds of bidding (and nearly two days of debate regarding whether BDS's bid violated the bidding procedures), BDS submitted a final bid of $105 million ($40.5 million in cash and $64.5 million in the form of a credit bid). Allied declared this to be higher and better than Jack Cooper's prior cash bid of $100 million.[9] Jack Cooper disputed Allied's determination that the final BDS bid was in fact higher and better and stopped bidding.[10] Several other parties in interest, including the official committee of unsecured creditors (the "Allied Committee"), disagreed with Allied's determination that the final BDS bid was the highest and best bid.[11] Notwithstanding this opposition, Allied declared BDS to be the prevailing bidder and the auction concluded.[12]

Between the end of the auction and the scheduled sale hearing, Jack Cooper filed an objection to the proposed sale to BDS. The objection declared that the auction was a "sham" and requested that the court either declare Jack Cooper's bid to be the highest and best bid or reopen the auction so that Jack Cooper could submit a higher offer.[13] Jack Cooper asserted that Allied had disregarded various material components of the bidding procedures in a manner that prejudiced Allied's stakeholders.[14] Subsequently and in support of Jack Cooper's objection, the Allied Committee filed a motion to reopen the auction, which motion ultimately was joined in by Allied.[15]

At the hearing, only BDS opposed reopening the auction. The court noted that it was reluctant to reopen the bidding in a situation where the losing bidder had a full and fair opportunity to participate at the auction.[16] Nonetheless, the court decided to "bow to the debtors' position" that the auction should be reopened in order to satisfy Allied's fiduciary duties to maximize the value of its assets.[17]

The court placed substantial weight on the fact that Allied now supported the reopening of the auction. The court noted that, without Allied's support, it was not inclined to grant the request of the Allied Committee and Jack Cooper to reopen the auction.[18] The court stressed that the debtor is "ultimately the one running the auction" and indicated that the court's primary function is not to oversee the auction but instead to determine whether the debtor has met its burden under sections 363 and 365 of the Bankruptcy Code for the sale of the assets and the assumption and assignment of executory contracts.[19] Because Allied reasonably concluded that it was necessary to reopen the auction, the court accommodated this request.[20]

In re Western Biomass Energy LLC

Western Biomass Energy LLC ("Western Biomass")—a demonstration/research and development ethanol plant located in Wyoming—filed a voluntary chapter 11 petition on October 31, 2012.[21] Shortly thereafter, Western Biomass retained Great American Group, LLC ("Great American") as a financial consultant and liquidator of its assets.[22] Pursuant to an auction procedures order entered by the court, Great American marketed and sold the assets through an on-line auction to GeoSynFuels, LLC ("GeoSyn"), for $525,000.[23] After the auction but prior to the entry of an order approving the sale, American Process, Inc. ("API") submitted an offer to purchase Western Biomass's assets for $1,218,750—more than twice the amount offered by GeoSyn.[24] In connection with the API bid, Western Biomass and its secured lender, Security National Bank of Omaha ("Security Bank"), agreed to carve out $325,000 of the API sale proceeds to pay the estate's administrative costs and provide for a meaningful distribution to unsecured creditors.[25]

Security Bank filed objections to the sale of the debtor's assets to GeoSyn, arguing that the sale price was grossly inadequate and that the court should instead approve the API transaction.[26] Western Biomass and the official committee of unsecured creditors also filed pleadings in support of the API transaction.[27]

After a two-day evidentiary hearing, the court sustained Security Bank's objection.[28] The court noted that although a bankruptcy court may exercise its broad discretion to reopen an auction, a judicial sale will not be set aside unless: (a) "the price is so grossly inadequate as to shock the conscience of the court"; and (b) additional circumstances indicate that the result is unfair.[29] As to the first requirement, the court concluded—based upon testimony from a qualified appraiser—that the GeoSyn sale price was grossly inadequate because it was less than fifty percent of the appraised value of the assets.[30] With respect to the second requirement, the court concluded that the GeoSyn sale was unfair because it "only provides a partial payment to one secured creditor, leaving all unsecured creditors with nothing" while, under the competing API bid, the committee and Western Biomass "might have the possibility of successfully obtaining a 'carve-out' from sale proceeds for distributions to unsecured creditors."[31] In light of these conclusions, the court sustained Security Bank's objection and denied approval of the GeoSyn transaction.[32]

In re North Texas Bancshares of Delaware, Inc. and North Texas Bancshares, Inc.

North Texas Bancshares of Delaware, Inc. and North Texas Bancshares, Inc. (collectively, "NTB") filed voluntary chapter 11 petitions on October 16, 2013. Shortly after the filing, the bankruptcy court entered an order setting certain bidding procedures and approving a financial buyer, Park Cities Financial Group, LLC ("Park Cities"), as the stalking horse purchaser.[33] On December 9, 2013, two bidders participated in the court-approved auction: Park Cities and a strategic buyer, Olney Bancshares of Texas, Inc. ("Olney").[34] When bidding concluded, Park Cities' final bid was $10,800,000 and Olney's final bid was $10,700,000 (after deducting the breakup fee and expense reimbursement payable to Park Cities from Olney's final bid).[35] Notwithstanding Olney's lower purchase price, NTB determined—citing concerns that regulators might not approve the sale to Park Cities—that Olney was the prevailing bidder.[36]

After the auction, Park Cities indicated that it would increase its bid by an additional $1 million. NTB, however, continued to believe that Olney's bid was the best bid due to the regulatory obstacles facing Park Cities.[37] Park Cities then filed an objection to the sale arguing that its bid was in fact the highest and best offer for NTB's assets and that the auction had not been conducted on a level playing field.[38] Park Cities requested that the bankruptcy court reopen the auction.[39] The official committee of unsecured creditors also filed an objection supporting Park Cities' bid.[40]

At the sale hearing, NTB announced a settlement whereby Olney would increase its final bid by an additional $450,000 and the committee and Park Cities would withdraw their objections.[41] As a result, the bankruptcy court approved the sale and was spared the difficult question of whether it should reopen the auction to let Park Cities submit an improved bid.

III. Against Late Bidding

Bidding procedures orders often declare, in effect, that "all bidding will be concluded at the auction." However, it is widely accepted that the bankruptcy judge has discretion to revoke or amend the order and accept an untimely bid.[42] Our claim is that bankruptcy judges ought not to indulge late topping bids, even if their statutory discretion allows them to do so, except insofar as the auction was conducted in a manner inconsistent with the bidding procedures order.

Bankruptcy judges asked to accept an untimely bid face a well-recognized dilemma. By definition, an upset bid promises to increase creditor recoveries. Honoring an upset bid will also tend to allocate the debtor's assets to the person best situated to put them to good use.[43] Moreover, everyone other than the auction winner who is to be displaced has an interest, after the auction, in having the bankruptcy judge allow the upset bid. On the other hand, it has been argued that the decision to accept an untimely bid undermines abstract values of legality—values like the integrity of the auction process or the reliability of judicial orders.[44]

In our view, this conventional statement of the judge's dilemma overlooks an important consideration. The conventional statement pits a concrete economic consideration—maximizing creditor recoveries—against systemic notions that are too abstract or too vague to carry water.[45] Our argument against untimely bidding sounds in the economics of information. The logic is simple in outline. A potential buyer who expects that late bids will be accepted is less likely than he otherwise would be to invest in information about the quality of the debtor's assets. The dynamic effect of a regime in which untimely bids are accepted is to reduce the likely number of active bidders, especially bidders who lack prior information about the debtor. This in turn will tend to reduce the sale price of an estate's assets. Thus, we argue, rejecting late bids is about more than vague ideals; it is about maximizing sale proceeds—not, perhaps, in the case at hand, but across the run of reorganizations.

The revenue equivalence theorem, one of the most remarkable discoveries occasioned by the game theoretic analysis of auctions, holds that, when risk-neutral bidders' values are independently defined, a wide variety of auction methods can be expected to fetch the same payoff for the seller.[46] If bankruptcy sales resembled such cases, the decision whether to allow untimely bids would be of little moment.[47] But most real-world auctions involve assets with "common value" as well as independent elements. That is, each bidder's reservation price will depend partly on the bidder's distinctive features—how well the assets for sale are likely to integrate with the bidder's existing assets—and partly on features common to all bidders—to wit, the quality of the assets. The revenue equivalence theorem does not hold where bidders' values are interdependent.

The existence of common value elements in a bankruptcy auction means that one bidder can learn from others. The process of bidding in an English (open ascending) auction turns private information public. A party who develops information can make use of it, but so too can all the other bidders who see the information deployed. Potential buyers will underinvest in information if they lack a means by which to capture its value. Some amount of free riding is inevitable in an open auction. Allowing late bids encourages it, because the opportunistic bidder can take time to revise his valuation models to account for the views reflected in other bidders' bids. A potential buyer who expects late bids to be tolerated is less likely to invest in relevant information than is a bidder who expects a short auction process followed by swift and certain confirmation of the sale. To be clear, the debtor's insiders and secured lenders are not our concern. They are likely to have a reasonably good understanding of the debtor's business whatever the auction rules. Rather, we are concerned with encouraging financial and strategic buyers who may be well positioned to incur the kinds of search costs that are prerequisite to them showing up to the auction in the first place. Making the results of an auction final and binding is a way to preserve the value of outsiders' investments in information.

If the intuition is not gripping, consider the status of breakup fees. The presence of a breakup fee tends to reduce creditor recoveries, conditional on the stalking horse having already prepared a bid. A breakup fee is justified, if at all, by the costs a stalking horse bidder must incur to investigate the debtor's assets and by other bidders' ability to free ride on those costs.[48] In other words, the breakup fee stimulates an investment in information that can make a going-concern sale viable. Breakup fees can increase expected recoveries ex ante, but they can only decrease recoveries ex post. In this sense, breakup fees are like binding time limitations. Moreover, the validity of each derives from the same bidding procedures order and so are presumably subject to revision in the same manner. Should bankruptcy courts dishonor breakup fees ex post, then, where doing so would generate a larger recovery for creditors? Clearly not. Bait-and-switch can work, but it quickly erodes credibility. The upset bid case differs from the breakup fee revocation case in degree only, not in kind.

Our reasoning recalls Frank Easterbrook and Daniel Fischel's classic argument for director passivity in the tender offer context.[49] Their thesis was that managers ought to refrain from taking defensive measures even if those measures could be expected to increase the offeror's bid price.[50] The naïve response is to blush. A board contemplating a takeover, like a bankruptcy judge overseeing a section 363 auction, should seek to maximize the price the assets will fetch. But, as Easterbrook and Fischel point out, the shareholders' position is a function both of the expected premium associated with a successful tender offer and the probability of such an offer occurring. Effective defensive measures transfer the surplus associated with a takeover from the offeror to the target. Their dynamic effect is to deter bids by discouraging potential offerors from investing in information about the target's assets.[51]

Asset sales under section 363 differ in important institutional respects from tender offers, of course. Most obviously, the debtor-in-possession is actively seeking to sell. Management, or at least capital structure, is due for a shakeup, and the public announcement of this fact draws potential buyers to the debtor's assets. But the underlying logic of the argument is the same, because encouraging the production of knowledge is a general problem.[52] Information is valuable. If those who develop information cannot protect it, they will under-produce. Thus, an important theme running through the law of contracts and of fraud protects a purchaser who fails to disclose superior knowledge about the subject-matter of a transaction, or who dissembles about his reservation price.

Indeed, the bankruptcy case for protecting investments in information is even stronger than the tender offer case. A target corporation's directors may have a role-specific reason to resist a takeover attempt. Directors owe their shareholders a presumptive duty to maximize the sale price.[53] Resistance may lead to a better offer and so increase the rents flowing to the target's stockholders. This is so because acquirers' search efforts depend on the expected average resistance the acquirer will face in the market, and no one firm can do much to alter the average.[54] That is, directors may have legal reason to act to maximize their shareholders' take even if doing so will reduce the likelihood (or expected value) of premia being offered to other firms' stockholders in the future. A bankruptcy court, by contrast, owes no similar obligation to claimants of the estates under its jurisdiction. To be sure, bankruptcy judges should ceteris paribus use their discretion in a value-maximizing way. But they are surely entitled to take into account the social as well as private effects of the precedents they generate. Put differently, the dictum that bankruptcy judges should seek to maximize creditor recoveries yields when maximization would reduce bankruptcy's utility in future cases.

Two caveats are worth mentioning. First, given our reasoning, it might be possible to distinguish between auctions in which common value elements predominate and those in which independent elements predominate. Clearly, the prospect of free-riding increases as the common value element grows in importance. One could imagine a sliding-scale approach under which late bids are more likely to be tolerated as independent value elements increase. We caution against such an approach. The problem is twofold. First, bankruptcy judges are poorly situated to distinguish cases. Sometimes common value elements will obviously dominate. For example, when a debtor's assets consist exclusively of mineral rights, the prospect of resale means idiosyncratic elements of value will be minimal. Other cases are harder to call. Second, and more decisively, the audience of a decision to allow an upset bid—future debtors and bidders—are unable to evaluate the judge's discrimination, even if expertly made. A categorical rule is best.

Second, one might object that bidders can already free ride on others' information during the auction. Most bidding procedures contemplate something like an English (open ascending) auction, allowing each bidder to see the others' bids. In these cases, no new information is revealed after the auction process concludes. There is some force to this line of thought, and it suggests that a sealed-bid procedure might make sense in cases where common value elements predominate—where, that is, the debtor's assets are unlikely to have synergistic aspects idiosyncratic to each bidder. But in most settings, a bidder will have only limited practical ability to update his valuation in short order. Indeed, this fact may help explain the common practice of concluding bankruptcy auctions over a short interval, often a single day.

IV. Conclusion

When a bidder seeks to place an untimely bid, bankruptcy judges will understandably be tempted to allow it. The bid promises to increase creditor recoveries in the case at hand. And it might seem harmless to allow the bid. If the lawyerly trope about the "interest in finality" were the only consideration on the other side of the ledger, we would sympathize with the temptation. How significant are the winner's reliance interests likely to be, really? But more is at stake. The bankruptcy judge who permits an untimely bid in effect writes off the importance of time constraints to the success of an auction. Short time limits curtail a bidder's ability to free ride on information others have gathered. They encourage the gathering of information in the first place and so can be expected to yield more competition among bidders and higher sale prices.

NOTES:

[1]Ongoing disputes over the role of credit bidding are exemplary of the centrality of auction design to modern bankruptcy practice. See, e.g., In re Fisker Automotive Holdings, Inc., 510 B.R. 55 (Bankr. D. Del. 2014) (limiting extent of credit bid right in section 363 sale upon finding that doing so would induce competitive auction); In re The Free Lance-Star Publishing Co., Case No. 14-30315-KRH (Docket No. 185) (Bankr. E.D. Va. Apr. 14, 2014) (similar); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012) (holding that credit bidding is a mandatory feature of auctions conducted pursuant to a plan of reorganization); see also Vincent S.J. Buccola & Ashley C. Keller, Credit Bidding and the Design of Bankruptcy Auctions, 18 Geo. Mason L. Rev. 99 (2010) (arguing that credit bidding should be permitted in all bankruptcy auctions).

[2]See, e.g., Bank of Am. Nat'l Trust & Savings Ass'n v. 203 N. LaSalle Street P'ship, 526 U.S. 434, 453 (1999); In re Central Ice Cream Co., 836 F.2d 1068 (7th Cir. 1987).

[3]No. 12-11564-CSS (Bankr. D. Del. May 17, 2012). The firm of two co-authors of this article, King & Spalding LLP, represented Jack Cooper Holdings Corp. as a bidder (and ultimately the prevailing bidder) in the *Allied Systems Holdings* auction (although the co-authors were not involved in the representation).

[4]No. 12-21085 (Bankr. D. Wyo. Oct. 31, 2012).

[5]No. 13-12699 (Bankr. D. Del. October 16, 2013).

[6]See Tr.of 8/14/13 Auction at 3–4, No. 12-11564-CSS (Bankr. D. Del. Aug. 20, 2013), ECF No. 1616-1.

[7]See Objection to Sale of the Debtors' Assets to New Allied Acquisition Co. LLC at 3, No. 12-11564-CSS (Bankr. D. Del. Sept. 3, 2013), ECF No. 1724 ("Jack Cooper Objection").

[8]Jack Cooper Objection at 3.

[9]Jack Cooper Objection at 3.

[10]See Tr. of Aug. 15, 2013 Auction at 68–70, No. 12-11564-CSS (Bankr. D. Del. Aug. 20, 2013), ECF No. 1616-2.

[11]Tr. of Aug. 15, 2013 Auction at 67.

[12]Tr. of Aug. 15, 2013 Auction at 85.

[13]Jack Cooper Objection at 1–2.

[14]Jack Cooper Objection at 17–18.

[15]See Motion to Reopen the Auction Relating to the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances, and Interests at 2–3, No. 12-11564-CSS (Bankr. D. Del. Sept. 6, 2013), ECF No. 1769; Response and Joinder to Motion of the Official Committee of Unsecured Creditors to Reopen the Auction Relating to the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, and Encumbrances at 2 (Bankr. D. Del. Sept. 8, 2013), ECF No. 1772.

[16]Tr. of 9/9/13 Hearing at 26, No. 12-11564-CSS (Bankr. D. Del. Sept. 10, 2013).

[17]Tr. of 9/9/13 Hearing at 26.

[18]Tr. of 9/9/13 Hearing at 26.

[19]Tr. of 9/9/13 Hearing at 25–26.

[20]Tr. of 9/9/13 Hearing at 27.

[21]See Op. on Objection to Sale at 2, No. 12-21085 (Bankr. D. Wyo. Aug. 6, 2013), ECF No. 304 ("Western Op.").

[22]Western Op., at 2.

[23]Western Op., at 2.

[24]Western Op., at 3.

[25]Western Op., at 3.

[26]See Objection to Sale and Motion for Entry of an Order Denying Confirmation of the Sale, No. 12-21085 (Bankr. D. Wyo. June 20, 2013), ECF No. 165.

[27]See Response in Support of Objection to Sale, No. 12-21085 (Bankr. D. Wyo. July 8, 2013), ECF No. 202; Response and Joinder in Support of Objection to Sale, No. 12-21085 (Bankr. D. Wyo. July 12, 2013), ECF No. 218.

[28]Western Op. at 1, 8.

[29]Western Op. at 5–6.

[30]Western Op. at 6.

[31]Western Op. at 7.

[32]Western Op. at 8.

[33]See Debtors' Brief in Support of the Motion for an Order (A) Authorizing the Debtors to Sell Certain Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (B) Approving the Assumption and Assignment of Certain Executory Contracts Pursuant to Section 365 of the Bankruptcy Code, (C) Waiving the 14-Day Stay under Bankruptcy Rules 6004 and 6006, and (D) Granting Related Relief, No. 13-12699 (Bankr. D. Del. December 11, 2013), ECF No. 182.

[34]Debtors' Brief at 5.

[35]Debtors' Brief at 7.

[36]Debtors' Brief at 7.

[37]Debtors' Brief at 7.

[38]See Park Cities Financial Group, LLC's Objection to Debtor's Selection of Olney Bancshares of Texas, Inc. as Successful Bid and Successful Bidder, and Motion to Reopen the Auction, No. 13-12699 (Bankr. D. Del. December 11, 2013), ECF No. 177.

[39]Park Cities Financial Group, LLC's Objection at 3.

[40]See Objection of the Official Committee of Unsecured Creditors of North Texas Bancshares of Delaware, Inc. and North Texas Bancshares, Inc. to Debtors' Sale Motion, No. 13-12699 (Bankr. D. Del. December 11, 2013), ECF No. 175.

[41]See Order (A) Authorizing the Debtors to Sell Certain Assets Free and Clear of Liens, Claims, encumbrances, and Other Interests, (B) Approving the Assumption and Assignment of Certain Executory Contracts Related Thereto, and (C) Granting Related Relief, No. 13-12699 (Bankr. D. Del. December 17, 2013), ECF No. 205.

[42]To be sure, reviewing courts might set outer bounds on the judge's application of discretion, as some have tried to do. See Kelly E. Porcelli, Finality of Section 363 Sales in the Face of an Upset Bid, 24 Am. Bankr. Inst. L.J. 497, 506–12 (2016) (giving a thorough analysis of the approaches appellate courts have taken). Inevitably, though, the bankruptcy judge will in practice have wide latitude. See, e.g., Corporate Assets, Inc. v. Paloian, 368 F.3d 761 (7th Cir. 2004). For that reason, we address our argument to the use of discretion, rather than to the doctrinal bulwarks appellate courts might erect to circumscribe it.

[43]A buyer's willingness to pay is the best indicator of his ability to put an asset to valuable use. To be sure, liquidity constraints might mask a buyer's true capacity to deploy assets in a socially valuable manner. But judges are poorly positioned to assess claims to that effect.

[44]See Bret Rappaport & Joni Green, Calvinball Cannot Be Played on this Court: The Sanctity of Auction Procedures in Bankruptcy, 11 J. Bankr. L. & Prac. 189 (2002) (arguing that the "integrity of the system" justifies rejecting untimely bids); Porcelli, supra note 42 (arguing that "integrity" and "finality" values justify rejecting untimely bids).

[45]We are not saying integrity and reliability are unimportant. On the contrary. The problem lies in deciding which practices, exactly, put those values in jeopardy. Law frequently directs parties and judges to update their positions as they learn new information. It is perhaps trivial to note that a judge who grants a summary judgment motion after previously denying a motion to dismiss is, from one perspective, undermining her earlier position. Yet no one thinks updating in this way threatens judicial integrity or interests in finality. New information—for example, the information disclosed in a developed record—justifies revising one's stance toward the necessity of a trial. Likewise, the emergence of an upset bid supplies new information. Whether a bankruptcy judge should update her view on the propriety of the sale cannot be determined by reference to principles framed so abstractly.

[46]The seminal work is William Vickrey, Counterspeculation, Auctions, and Competitive Sealed Tenders, 16 J. Fin. 8 (1961); see also John G. Riley & William F. Samuelson, Optimal Auctions, 71 Am. Econ. Rev. 381 (1981) (generalizing Vickrey's results); Roger B. Myerson, Optimal Auction Design, 6 Math. Oper. Res. 58 (1981) (same). For a reasonably accessible survey of the field, see Paul Klemperer, Auction Theory: A Guide to the Literature, 13 J. Econ. Surveys 227 (1999).

[47]A bidder's power to submit an upset bid would simply be understood as a part of the structure of the auction itself.

[48]See, e.g., Micah S. Officer, Termination Fees in Mergers and Acquisitions, 69 J. Fin. Econ. 431 (2002) (providing evidence that breakup fees in merger agreements tend to increase premia by inducing stalking horses to reveal valuable information); Ian Ayres, Analyzing Stock Lock-Ups: Do Target Treasury Sales Foreclose or Facilitate Takeover Auctions?, 90

Colum. L. Rev. 682, 698 (1990) (explaining how lockups can induce a bidder to incur sunk costs); cf. Bruce A. Markell, The Case Against Breakup Fees in Bankruptcy, 66 Am. Bankr. L.J. 349 (1992) (arguing that the desirability of breakup fees is overstated in the bankruptcy sale context).

[49]See Frank H. Easterbrook & Daniel R. Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981).

[50]Easterbrook & Fichsel, 94 Harv. L. Rev. 1161.

[51]Easterbrook & Fichsel, 94 Harv. L. Rev. at 1175–80; see also Frank H. Easterbrook & Daniel R. Fischel, Auctions and Sunk Costs in Tender Offers, 35 Stan. L. Rev. 1 (1982).

[52]Search costs are ubiquitous in commercial contexts. To induce a buyer to sink these costs, a seller will frequently wish to precommit to an announced sale process. Surprisingly, the law ignores unilateral declarations to this effect in many commercial contexts. Perhaps it should not. For an illuminating discussion of the general problem of unilateral declarations in the commercial context, see Saul Levmore & Ariel Porat, Credible Threats (working paper, 2014), manuscript at 4–11. But in any event, bankruptcy judges should take seriously their capacity to act as a commitment device for a debtor seeking to sell itself for the highest possible price.

[53]See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[54]See, e.g., Ronald J. Gilson & Alan Schwartz, Defensive Tactics and Optimal Search: A Simulation Approach (working paper, 2017), manuscript at 11.