

Disappointed Bidders Don't Have Standing to Appeal an Order Approving a Sale of Assets

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The purpose for which chapter 11 was established was to provide companies with breathing room while they reorganize. However, in the past several years, many chapter 11 cases have evolved into a sale of substantially all of a debtor's assets followed by a liquidating plan or conversion to chapter 7. Typically, the selection of a stalking-horse bidder¹ is followed by approval of bid procedures, an auction and finally a hearing seeking entry of an order approving the sale.



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The majority of courts, including several courts of appeal, have held that a disappointed bidder has no standing to appeal a sale order because the Bankruptcy Code is designed to protect creditors, not strangers to the estate. Also,

courts have had little sympathy for disappointed bidders when they have no pecuniary interest or damages at stake. However, some courts have found an exception to the general rule. A disappointed bidder may have standing to challenge the intrinsic fairness of a sale if it can establish that the sale was tainted by fraud or collusion.

No Standing to Appeal

As one bankruptcy court noted, "[t]he statutes and rules governing sales by trustees appear to be designed to protect the estate, not potential purchasers."² Regarding the sale of a debtor's assets, the court concluded that "there is nothing to indicate that prospective purchasers are within the zone of interests intended to be protected through this statutory scheme."³ One bankruptcy judge has ruled previously that a frustrated bidder does not have standing to object to a motion to sell assets.⁴

¹ A "stalking horse" is the first one willing to sign an asset-purchase agreement, which sets the bar for potential competing bids. The stalking horse is usually rewarded with a break-up fee if outbid at auction.

² *In re Nipasco Inc.*, 36 B.R. 25, 26 (Bankr. D. Maine 1983).

³ *Id.* at 27.

⁴ *In re Keim*, 212 B.R. 493, 497 n. 3 (Bankr. D. Md. 1997). See also *In re Cloverleaf Enterprises Inc.*, 2011 WL 67314572 (Bankr. D. Md. March 11, 2011) (court would have to find disappointed bidder has standing, position contrary to that adopted by most courts).

About the Author

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More than one circuit court of appeals has ruled similarly regarding a lack of standing for disappointed bidders.⁵ For example, the Tenth Circuit has held that an unsuccessful bidder is not an "aggrieved person" as required and has no standing to appeal.⁶ The debtor, a single-asset real estate entity, entered into two contracts to sell its office and sought court approval for the contract with less contingencies.⁷ The disappointed bidder appealed and sought a stay pending appeal, which the bankruptcy court denied.⁸ Thereafter, the appeal was dismissed as moot by the district court.⁹ The Tenth Circuit affirmed, noting in a

cluded that Chrysler was not a "person aggrieved" even under its version of the facts.¹⁵ Chrysler had failed to show how its interests would be affected under the buy-sell agreement or under an auction.¹⁶ Accordingly, not being a "person aggrieved," Chrysler had no standing to pursue an appeal.¹⁷

More recently, the Sixth Circuit also concluded that frustrated bidders do not have standing to object to a sale of property.¹⁸ A prospective purchaser submitted a bid after the deadline set forth in the court-approved bid procedures.¹⁹ After approval of a sale to the only timely bidder, the frustrated bidder appealed the sale order.²⁰ The district court dismissed on the grounds that the disappointed bidder lacked standing,²¹ and the Sixth Circuit affirmed.²² As a disappointed bidder, the appellant was "not within the 'zone of interests' to be protected by the Bankruptcy Code and applicable law."²³ Also, as an interested bidder, the appel-

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lant lacked any interest in the property.²⁴ Finally, the Sixth Circuit commented that the appellant lacked standing because it failed to establish that the sale order diminished its property, increased its burden or impaired its rights.²⁵

The Third Circuit has held that a "not aggrieved" person does not have standing to appeal a bankruptcy court order.¹¹ In that case, Chrysler Corporation challenged a bankruptcy court's order denying their motion for reconsideration related to the sale of a franchiser.¹² One of the secured creditors moved to dismiss Chrysler's appeal for lack of standing.¹³ First, the Third Circuit noted that Chrysler was appealing the district court's approval of a bankruptcy court order that it never appealed.¹⁴ Additionally, the Third Circuit con-

cluded that Chrysler was not a "person aggrieved" even under its version of the facts.¹⁵ Chrysler had failed to show how its interests would be affected under the buy-sell agreement or under an auction.¹⁶ Accordingly, not being a "person aggrieved," Chrysler had no standing to pursue an appeal.¹⁷

Subsequently, the Sixth Circuit reiterated its view that a party has no standing to appeal unless such party was directly and adversely affected pecuniarily by such ruling.²⁶ In that case, the trustee agreed to abandon the debtor's stock (of which it owned a one-third interest) if the debtor paid an amount to cover all filed claims.²⁷ The owner of the remaining shares objected and argued that he should have been able to purchase the shares.²⁸ The Sixth Circuit disagreed, and affirmed the bankruptcy

⁵ See, e.g., *In re Morat*, 566 F.3d 676, 681 (8th Cir. 2009) (no standing for frustrated bidder because his interests were not aligned with bankruptcy estate's creditors); see also *In re Squire*, 2008 WL 2497706 *3 (8th Cir. June 23, 2008) (frustrated bidders do not have standing to object to sale of property).

⁶ *In re Broadmoor Place Investments LP*, 994 F.2d 744, 746 n. 2 (10th Cir. 1993).

⁷ *Id.* at 745.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 746, n. 2.

¹¹ *Krebs Chrysler-Plymouth Inc. v. Valley Motors Inc.*, 141 F.3d 490, 493-4 (3d Cir. 1998).

¹² *Id.* at 492.

¹³ *Id.* at 493.

¹⁴ *Id.* at 494.

¹⁵ *Id.* at 496.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *In re Squire*, 2008 WL 2497706 *3 (8th Cir. June 23, 2008).

¹⁹ *Id.* at *1.

²⁰ *Id.* at 2.

²¹ *Id.*

²² *Id.* at 3.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *In re Morat*, 566 F.3d at 681.

²⁷ *Id.* at 678.

²⁸ *Id.*

appellate panel (BAP) and bankruptcy court.²⁹ The Sixth Circuit was unsympathetic to his claims and commented that “[h]is interests...as a frustrated bidder for the stock are not the sort of interests that support standing for the purpose of his bankruptcy appeal.”³⁰ The Sixth Circuit opined that such interests were better protected in state court rather than in federal appellate courts.³¹ Because the bankruptcy court order had no bearing on the appellant’s stock ownership rights, he had no standing to object to the abandonment.³² “Stark similarly lacks bankruptcy appellate standing in his capacity as a frustrated bidder for the Airpack stock, because his interests are not aligned with those of the bankruptcy estate’s creditors.”³³

Reserve Golf Club of Pawleys Island

Bankruptcy courts have applied the same logic to deny standing to disappointed bidders. Most recently, in *In re Reserve Golf Club of Pawleys Island LLC*,³⁴ the debtor filed a motion seeking to sell substantially all of its assets under § 363.³⁵ The official unsecured creditors’ committee (consisting of former club members who had resigned and had placed a *lis pendens* on the debtor’s property) would not receive a refund from the sale objected to the sale.³⁶ The court held that the committee had no standing due to a lack of pecuniary interest and commented that the former club members had the opportunity to vote on the proposal, which resulted in the sale and the extinguishing of refunds for initiation fees.³⁷ Accordingly, the court did not consider the committee’s objection to the sale.³⁸

When a chapter 7 trustee sought to sell real property free of liens, a tenant objected.³⁹ After the bankruptcy was filed and it was converted to chapter 7, the property was transferred to the debtor and the trustee sought to sell the property free and clear of real estate taxes but not free of any lease.⁴⁰ The ten-

ant, which had signed a lease with the owner of the property (the debtor’s parent corporation), objected on the basis that it had submitted a higher bid.⁴¹ The court agreed with the prospective purchaser that the tenant had no standing to object.⁴² Acknowledging the tenant’s interest in the property, the court noted that it would not approve a sale free of the tenant’s interest.⁴³ However, the proposed sale did not attempt to accomplish this. Moreover, as a disappointed bidder, the tenant had no standing to object to the sale.⁴⁴

If a frustrated bidder has no pecuniary interest, such bidder is not a party protected by the Code. However, the rule is not absolute. An exception exists when there are allegations of bad faith on the successful purchaser's part.

A final interesting comment related to the need for a court order: “Neither the Bankruptcy Code nor the Rules of Bankruptcy Procedure require court approval of a sale of estate property absent objection.”⁴⁵ Because the tenant had no standing to objection, there were no objections and no court approval was required to approve the sale.⁴⁶

Gulf States Steel Inc. of Alabama

In *In re Gulf States Steel Inc. of Alabama*,⁴⁷ the court ruled on two motions for a stay pending appeal arising out of a sale order. The court had previously approved the chapter 7 trustee’s decision to sell certain of the debtor’s assets.⁴⁸ The court found no likelihood of success on the merits based on the conclusion that both movants lacked standing to pursue an appeal.⁴⁹ The decision relied on the

“aggrieved-persons” standard articulated by the Eleventh Circuit.⁵⁰ The court held that parties had to have a financial stake in the order being appealed to have appellate standing.⁵¹ Because the movants had no financial stake, they had no standing.⁵² The court also pointed out that competing bidders typically do not even have standing to challenge a sale.⁵³

Gulf States Reorganization Group v. Nucar Corp.

One circuit court has held that a disappointed bidder has standing, albeit under slightly different circumstances. In *Gulf States Reorganization Group v. Nucar Corp.*,⁵⁴ a disappointed bidder (the “group”) challenged a competitor’s acquisition of the debtor’s steel mill assets as a violation of the anti-trust laws. At the auction, the trustee rejected the group’s bid but gave it additional time to make a confirming cash bid, which it chose not to do.⁵⁵ After auction, the disappointed bidder sued the purchaser in district court alleging violations of the Sherman Act.⁵⁶ The district court concluded that the cause of the losing bid was a refusal to submit a higher cash bid.⁵⁷ However, this alone did not obviate a causal connection between defendants’ conduct and plaintiffs’ injury.⁵⁸ Accordingly, the court found there was standing based on an anti-trust law violation, not because the group was a disappointed bidder.⁵⁹

Standing to Appeal

Some courts have held that the rule denying standing to disappointed bidders is not absolute.⁶⁰ In *Wallach v. Kirschenbaum*, after conversion from chapter 11 to chapter 7, the chapter 7 trustee filed a motion to sell assets and then, prior to entry of a sale order, submitted a proposed order withdrawing the motion to sell.⁶¹ The bankruptcy court never entered the sale order but did enter the order approving a withdrawal of the sale motion.⁶² A disappointed bidder (the debtor’s spouse,

²⁹ *Id.* at 678-79.

³⁰ *Id.* at 680.

³¹ *Id.* at 681.

³² *Id.*

³³ *Id.* See also *In re Urban Broadcasting Corp.*, 401 F.3d 236, 243 (4th Cir. 2005) (no standing to appeal unless aggrieved by court’s order); *In re Quonayze Oil & Gas Corp.*, 280 B.R. 83, 90 (Bankr. W.D. Tex. 2000) (motion to reconsider failed for lack of standing on part of purported equity-holder who could not show pecuniary interest).

³⁴ 428 B.R. 678, 679 (Bankr. D. S.C. 2010).

³⁵ *Id.*

³⁶ *Id.* at 683.

³⁷ *Id.* at 685. See also *Big Shanty Land Corp.*, 61 B.R. 272, 277 (N.D. Ga. 1985) (no standing because creditor was not “person aggrieved”).

³⁸ *Id.* See also *In re Holwerda*, 428 B.R. 730, 732 (Bankr. W.D. Mich. 2010) (prospective purchaser had standing to object because it was court-approved buyer in first transaction, not merely disappointed bidder).

³⁹ *In re Labanc Inc.*, 299 BR 548, 548 (Bankr. N.D. Iowa 2003).

⁴⁰ *Id.* at 549.

⁴¹ *Id.*

⁴² *Id.* at 550-51; see also *In re Planned Systems Inc.*, 82 BR 919, 922 (Bankr. S.D. Ohio 1998) (agreeing with cases holding that frustrated bidder lacks standing to object to sale of debtor’s property).

⁴³ *Id.* at 551.

⁴⁴ *Id.* The court held that the tenant was not a creditor because the lease was not entered into with the debtor and the tenant had no claim against the debtor on the petition date. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* This seems to be a generous reading of the Bankruptcy Code and Rules. Also, most purchasers would be hesitant to consummate a purchase of a debtor’s assets without a court order, even in the absence of objections.

⁴⁷ 285 B.R. 739, 741 (Bankr. N.D. Ala. 2002).

⁴⁸ *Id.*

⁴⁹ *Id.* at 742.

⁵⁰ *Id.* See *In re Odom*, 702 F.2d 962, 963 (11th Cir. 1983) (only standing to appeal when directly and adversely affected pecuniarily by order).

⁵¹ 285 B.R. at 742.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 466 F.3d 961, 964 (11th Cir. 2006).

⁵⁵ *Id.* at 964.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 966.

⁶⁰ See *Wallach v. Kirschenbaum*, 2011 WL 2470809 *4 (E.D.N.Y. June 16, 2011).

⁶¹ *Id.* at *3.

⁶² *Id.*

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